THE LAW REPORTER.

JULY, 1845.

LIFE OF JUDGE SMITH.[1]

We have seldom anticipated more pleasure than when the publishers laid upon our table a life of the late Judge Smith, of New Hampshire, whose reputation as a lawyer and a man of learning and wit stands so high with the New England bar. Nor has an examination of the volume disappointed our expectations. With some exceptions, to which we shall presently refer, the work is well executed, and may be regarded, in more respects than one, as a model of its kind. We marvel that the author, who is a member of the clerical profession, has succeeded so well in sinking the shop, and has so entirely devoted himself to his task, without making the writer at all prominent, or thrusting forward opinions upon subjects, which, he has wisely supposed, his professional readers are more competent to judge of than himself. We believe it was Jeffrey who said of a lady, that if she wore blue stockings, her petticoats were sufficiently long to conceal them. It has occurred to us more than once, while reading this volume, that if the author were a minister, the white cravat was nowhere visible. We intend no disrespect to the clerical profession by these remarks, but it is so seldom that gentlemen of the cloth un-

[1] "Life of the Hon. Jeremiah Smith, LL.D., Member of Congress during Washington's Administration, Judge of the United States Circuit Court, Chief Justice of New Hampshire, &c. By John H. Morrison. Boston: Little & Brown."

dertake to write of law and lawyers, without indulging in silliness and stupidity, and exhibiting a total ignorance of the true morality and actual merits of the legal profession, that we are thankful to find how much good sense, worldly wisdom and just appreciation of real excellence, the biographer of Judge Smith has brought to his task. The work is also well digested and arranged. The narrative, written in a clear and simple style, is, in general, sufficiently minute, without being tedious, and the selections from correspondence, are judiciously woven into the story in such a manner as to seem natural, and serve to illustrate the subject in the best possible manner.

Jeremiah Smith was born in Peterborough, New Hampshire, in 1759. His father, who had immigrated from the North of Ireland, was, on the paternal side, Scotch, and on the maternal, of English descent. He was a man of a strong mind, modest, gentle, discreet and devout. The mother of Judge Smith was a woman of energy and spirit, who "kept the scold a-going," a thrifty housewife, a rigid disciplinarian, and a strict presbyterian. Jeremiah was faithfully instructed in the religious faith of his parents, and, like most of the great lawyers of the old school, he was early familiar with the Bible, for which, not less on account of its literary merits than as the great repository of divine truth, his admiration never abated. He read it again and again, and committed large portions of it to memory. The Old Testament, especially, was a never-failing resource.

In 1777, about two months after he was entered at Harvard College, he enlisted in the army for two months, and was at the battle of Bennington. At Cambridge he was a classmate of Hon. John Davis, late judge of the United States district court for Massachusetts — who still lives to receive the admiration and respect of the public, whom he served so long and so well. Samuel Dexter and Elijah Paine, men of much distinction in their day, were also the classmates of Mr. Smith. After remaining at Cambridge two years, he was entered at Queens (now Rutgers) College, in New Jersey, and was graduated in 1780. In 1782 he commenced the study of the law with Shearjashub Bourne, of Barnstable, Massachusetts, being at the same time a private teacher in the family of Brigadier Otis. He was under the necessity of supporting himself in part or altogether, by keeping school, and was not admitted to the bar until 1786, and then under somewhat peculiar circumstances.

"His course of study, as we have seen, had been much interrupted by other occupations, and, though he produced ample evidence of his legal qualifications,

it was not easy to show precisely how much time he had spent in acquiring them. There was a strong feeling among the lawyers against his admission. The court was to adjourn on Saturday, and he could not succeed in getting a meeting of the bar called till Friday morning, when, after considering his application, they rejected it, on the ground of its not being accompanied by the proper certificates. He immediately set out on horseback for Salem, and, having rode all night, arrived at Amherst the next morning with the required recommendation from Mr. Pynchon, which he offered to the president of the bar, with a request that another meeting might be called. This was refused on the ground of want of time; when Mr. Smith rose and appealed to the court, who were so convinced of the envious injustice with which he had been treated, that, waiving the usual forms, they at once unanimously admitted him. The bar were exceedingly angry, and spent the remainder of the forenoon in the most taunting remarks and insinuations. One moved that Jo Blanchard should be admitted to the bar; another proposed Judge Shepherd, a man who turned tory during the war and joined the British: and other members of the bar, in insulting tones, proposed others who were either notoriously ignorant or notoriously wicked. The court paid no attention to them, and they could only comfort themselves by asserting, that it was of no consequence, as he certainly would not be admitted to the superior court. But the young man whom they so despised for his want of legal knowledge, almost immediately took his place at the head of the bar. At the next sessions he appeared with a full docket, and was employed to argue their causes by some of the very men who had most violently opposed his admission."

Mr. Smith throughout life was a most industrious man, and, on commencing practice in the comparatively obscure town of Peterborough, he devoted himself to study, and to the duties of his profession, with great zeal and success. He did not deem it necessary, however, to abstain wholly from public life, probably supposing, with most lawyers of his day, that law and politics were in some measure dependent upon each other. He was successively town clerk, surveyor of highways, and a representative in the general court. He also became town agent in 1787, and succeeded in accomplishing several useful things for his townsmen, not the least of which was the settlement of some vexatious and foolish suits, in which they had been long engaged. This litigious spirit, which had been encouraged by a few pettyfogging laymen, he opposed with manly spirit and independence, and finally succeeded in closing the wounds which had been running many years under the care of unskilful surgeons. As one of the selectmen, also, he accomplished much good. Through his influence five new schoolhouses were erected in 1791, and, by procuring better teachers, an impulse was given to the course of education, which has been felt in the character of the inhabitants ever since.

"During three years, 1788, 1789 and 1790, Mr. Smith represented the town in the general court, and took there the same high place which he had already taken at the bar. In 1789 and 1790, he was chairman of the committee appointed 'to

select, revise and arrange all the laws and public resolves then in force, whether passed before or since the revolution.' The labor devolved almost entirely on him, and took up all the time he could spare for two or three years. The work he accomplished is not easily estimated, but must have been of great and important service to the state. As an evidence of the stand he took in the legislature, it may be mentioned that the house, having voted (June 17, 1790,) to impeach the Hon. Wodbury Langdon, one of the justices of the superior court, appointed Mr. Smith to conduct the impeachment, although he had voted against it. He was obliged to go to Worcester, Mass., to get forms by which he might draw up the articles of impeachment. His speech, which is preserved, written out in full, shows some of the characteristics of his mind, but lacks the heartiness with which a strong man utters himself when he has full confidence in his cause."

In 1790, Mr. Smith was chosen a member of the second congress, which began its session in October, 1791. While in this station, he was an able defender of Washington's administration, and some of his speeches on constitutional points have been commended by Mr. Webster as excellent. He was a most diligent member — a constant learner — and in all that related to the minutiæ of business and the details of legislation, he was useful and influential. But his mind was better adapted to professional pursuits than the contests of political life, and he does not seem to have taken the rank in congress, to which his real ability entitled him.

In March, 1797, Mr. Smith was married to Miss Eliza Ross, of Maryland. He removed to Exeter, and, in the same year, having been appointed United States attorney for the district of New Hampshire, he resigned his seat in congress. It seems to have been his intention at this time to withdraw altogether from political life, and to devote his whole time to the duties of his profession. But he still felt a warm interest in the subjects that agitated the public mind, and his letters display great warmth of feeling in relation to the democratic movement, and no small acrimony at the conduct of the powers that were, and the French nation in general. It has long been our opinion, that party bitterness has decreased since the times of Adams and Jefferson, and the style of some of Judge Smith's letters confirms us in that opinion. Witness the following advice which he gave to Mr. Wolcott, the secretary of the treasury, in respect to his appointments in New Hampshire: "A real jacobin, in my opinion, is never made by want of knowledge only. It is the qualities of the heart that constitute the essence of this detestable character. He hates the light, because it reproves his deeds. It is a solecism in politics, that a government should be administered by its enemies. It has always been my opinion, that those whom the sovereign people entrust with the administration of

their political concerns, are in duty bound to appoint and continue in office, those men, and those only, who are firmly attached to the principles of our government and the administration." It is but justice to state, however, that Mr. Smith condemned this doctrine in his riper judgment, and maintained that it was inconsistent with the true principles of a republican government.

Mr. Smith now devoted himself almost exclusively to his profession. His practice soon became laborious and extensive in the counties of Rockingham, Strafford, Hillsborough and Cheshire, and, for that location, was highly profitable. His net income in 1799 was $2351, in 1800 it was $3018 69, and in the following year, $3077 50. In 1800, he was appointed judge of probate for Rockingham county, and held the office two years. In 1801, he was appointed a judge of the circuit court of the United States, an office which he held but a short time, in consequence of the repeal of the law establishing the court. In 1802, he was appointed chief justice of New Hampshire, but declined accepting the office until the salary was raised from $850 to $1000. But being soon convinced of the inadequacy of the salary, he addressed a long letter to the legislature on the subject, and a resolution passed the house by a vote of 101 to 57, and the senate by a vote of 11 to 1, fixing the salary of Mr. Smith at $1500 a year, during his continuance in the office of chief justice. This resolution was the more honorable both to him and to them, from the fact that a majority of the legislature were opposed to the political principles which he was perfectly well known to profess.

"From the time when he entered upon his office, in 1802, till he left it, in 1809, Judge Smith gave himself to it with his whole heart. He went through nearly the whole circuit of the state twice a year, travelling over roads often so bad that he could go only on horseback, and bridges, of which, many years afterwards, he said that he remembered well their condition when he had occasion to pass them; 'and certainly,' he added, 'he must have been destitute of piety who did not return thanks to Providence, when he found himself and his horse safe on the further side.' When he came home, worn down by a laborious circuit, he usually refreshed himself for a week or two, by reading novels or any other species of light literature that might be within his reach. The remainder of his vacation was spent in constant application to the severe studies of his profession, reviewing his decisions, examining legal questions on points reserved for the purpose, extending his knowledge to the less frequented departments of the law, enriching his mind with the principles of legal science, to be drawn from theological investigations, or an enlarged acquaintance with history, and doing all this with reference to a better system of legal practice and a better administration of justice. He went scarcely at all into society, and sometimes for weeks was hardly seen without the doors of his own house. Almost his only relaxation was with his own family. It is impossible for those who did not know him in his own house, to have any idea how

much amusement he could extract from the most trifling events, and how much incidents, which others leave as unworthy of notice, were made to contribute to the animation and real enjoyment of the whole household, while they had no small share of influence in preserving the vigor and elasticity of his constitution. It was a saying of Paley, that 'he who is not a fool half the time, is a fool all the time.' And the reader probably remembers the story of Robert Hall, who, on being reproached by a very dull preacher with the exclamation, 'How can a man who preaches like you, talk in so trifling a manner!' replied, 'There, brother, is the difference between us: you talk your nonsense in the pulpit, I talk mine out of it.' Judge Smith used often to tell, with great zest, the story of Dr. South, I think, who, in the midst of a frolic, seeing an acquaintance approaching, exclaimed, 'Stop, we must be grave now, there is a fool coming.' Certainly, no one without a true relish, not only for wit but for fun, can at all appreciate Judge Smith's character, or fully understand even his more serious conversation and writings. His humor, like the foam and phosphoric light in the wake of a man-of-war, often marked the progress of his mind through subjects the most profound, and in his moments of relaxation, it burst out and flashed in all manner of antic and fantastic shapes. He would, for instance, amuse himself and family, by imagining them in strange situations, with people perhaps the most incongruous, and then would carry on, with the drollest effect, long conversations between the persons thus grotesquely brought together. Sometimes the assumed names would be preserved, and the farce or romance kept up for weeks together, as if it were a fact connected with their daily life."

The judicial character of Judge Smith has been happily sketched by one who knew him well, Hon. Jeremiah Mason.

"Judge Smith's natural powers of mind were of a high order. With an ardent and excitable temperament, he acquired knowledge easily and rapidly. After he commenced the practice of law, he always indulged himself freely in miscellaneous reading and studies; and his attainments in literature and general knowledge were highly respectable. But the chief labor of his life was devoted to the study of the law. This he studied systematically as a science. As a counsellor and advocate, he soon rose to the first grade of eminence at the bar. Although successful at the bar, he was preëminently qualified for the office and duties of a judge. With an ample stock of learning, in all the various departments and branches of the law, well digested and methodized, so as to be always at ready command, he united quickness of perception, sagacity, and soundness of judgment. Disciplined by a long course of laborious study, he was able to bear with patience the most tedious and protracted investigations and discussions, to which a judge is so constantly subjected. The most distinguishing traits of his character were impartiality and inflexible firmness, in the performance of all his judicial duties. As chief justice of the supreme court of New Hampshire, he found a sufficiently ample field for the exercise of all his talents. Before the revolution, little had been done in the colony of New Hampshire to systematize the practice of law; and, for many years after the revolution, lawyers were seldom selected to fill the bench of even the highest courts. The consequence was, that the practice and proceedings of the courts were crude and inartificial; and the final determination of causes depended more on the discretion and arbitrary opinions of the judges and jurors, than on any established rules and principles of law. This, of course, rendered judicial decisions vague and uncertain, the most intolerable evil of a bad

administration of justice, and but slightly alleviated by the highest purity of intention in the judges. To remedy this evil, Judge Smith labored with diligence and perseverance, by establishing and enforcing a more orderly practice, and by strenuous endeavors to conform all judicial decisions to known rules and principles of law. His erudition and high standing with the profession, as well as with the public at large, enabled him to effect much in this respect; and to his labors, the state is greatly, if not chiefly, indebted for the present more orderly proceedings and better administration of justice."

We have before intimated, that when Judge Smith resigned his seat in congress, it was his intention to retire altogether from political life. It would have been better for his happiness and reputation if he had kept this resolution. But he was persuaded, against his interest and inclination, to enter again that barren field, and although his biographer intimates an opinion that he was chiefly influenced by a desire to exert the gubernatorial influence to improve the laws, we do not doubt that there were other more potent influences at work underneath. In short, it seems to have been the common case of a political party making use of a popular name to accomplish their own purposes. It may be, and probably was the case, that those who were urging him to descend from a high and honorable position into the noisy arena of political strife, suggested to him the argument which his biographer has alluded to. That this alone would have caused him to take this mistaken step we do not believe. He was chosen governor in 1809. He held the office one year, and the whole of his short administration was a series of defeats and mortifications. His own friends, finding the current setting against him, more than deserted him; they asked him to become a party to his own defeat and disgrace, a part he resolutely refused to act. "There was left on his mind," we are told, "a feeling which he never got over, of inexpressible repugnance to the little, self-elected, irresponsible cliques, who by their secret management would dispose of all offices and control public affairs." But a man of his age and experience should have learned this at an earlier day. In this whole matter he can receive but little sympathy, although many others have done the same thing with no better success. His course was inconsistent, feeble and unwise. *Inconsistent*, because it was a part of the political faith which he professed, not to suffer politics to interfere with the judiciary, and how could the chief justice of the state, with any show of consistency, suffer himself to be the candidate of a political party, without at once resigning his seat? *Feeble*, in suffering his own opinion to be overcome by the persuasions of others. *Unwise*, in supposing that he could do more to improve the laws, as governor, as parties then stood, than as one of the highest of the

judiciary. There is no portion of the work before us which is more instructive than that which relates to this part of Judge Smith's life. It is by no means the first instance in which men of rank in our profession, who, by the very nature of their occupation, become unfitted to manage the thousand springs which act upon the public mind, have made the fatal mistake of risking all in a race where substantial merit is not always the winner. Mr. Smith's mistake did not end here. Coming again at the bar, and entering into honorable competition with the three most remarkable lawyers in the country — Jeremiah Mason, Daniel Webster and George Sullivan, he did not lose his cheerfulness, or give the least evidence of the embittered feelings of an ill-used and disappointed man; but he soon suffered himself to be mixed up with the disgraceful conduct of his party, and became in a degree identified with measures that were as extraordinary as they were disgraceful. In 1813, the federalists being in power, an act was passed, by which the old courts were abolished, and every superior and inferior judge in the state was thrown out of office. This was the course of a party who had been the loudest in their professions of respect to the rights of the judiciary, and was in direct violation of their own avowed principles, when out of power. It was a thoroughly radical measure carried by those who had from the first prided themselves upon conservatism. Mr. Morrison, although he condemns the act, says that the democratic party had no reason to complain, because they had given a precedent in abolishing the United States circuit court, and the court of common pleas, in Massachusetts. But we do not see the force of this reasoning. In our judgment, they *had* reason to complain, inasmuch as they had been abused by the federalists, without stint or measure, for those very acts, and by none more than the men in New Hampshire, who, as soon as they got the power, showed their sincerity by adopting the very course they had thus violently opposed.

The democratic party had the authority of their opponents in considering the act as utterly unconstitutional, and they threatened a civil revolution in the state. The federalists, in their alarm at what they had done, considered it impossible for the new court to get under weigh, unless Mr. Smith consented to be the chief justice. To him it was a source of extreme perplexity and vexation. He heartily disapproved of what had been done, and yet by consenting to be placed at the head of the new judiciary, he must expect to encounter all the difficulties, and to bear all the odium connected with it. In a pecuniary point of view it was a great sacrifice, since his income at the bar was more than three times what it would be

upon the bench, and his circumstances at that time were such as to make this a matter of considerable consequence to him. But his usual good sense and sound judgment were at length overcome, and he accepted the office of chief justice. It was the most unfortunate act of Judge Smith's life, that he consented to soil his hands in this dirty business; and the conduct of those who urged him to this course, was of a piece with that famous story in which a monkey and a cat's paw played a conspicuous part. The extraordinary proceedings in New Hampshire under the new judiciary act are succinctly stated by Mr. Morrison:

"Influenced by these considerations, Mr. Smith accepted the office, with Arthur Livermore (the late chief justice,) and Caleb Ellis, for associates. There can be no doubt that he had a perfect right to accept the office; since, whatever may be thought of the act by which the old superior court was abolished, the legislature was unquestionably authorized by the constitution to establish such new courts as it might see fit. But Messrs. Evans and Claggett, of the old court, regarding as unconstitutional the act by which their offices had been taken from them, determined still to go on in the performance of their judicial duties, as if no such act had been passed. The democratic papers threatened to maintain by violence, if necessary, the authority of the old judiciary, and private letters were received by Judge Smith, urging him, if he would avoid a civil war, to decline accepting the office. These threats, of course, had no influence upon him. He felt the delicacy of his situation, and, foreseeing, prepared himself to meet the difficulties and embarrassments that were to be thrown in his way. The first term of the court was to be holden at Dover, in Strafford county, and it was thought best that it should be opened by Judge Livermore, as he had been chief justice in the old superior court, and seemed to be entirely satisfied with the present arrangement. On Tuesday morning, September 7, he reached Dover, at about nine o'clock, and finding his old associates, Messrs. Evans and Claggett there, with the determination of holding their court at the same time and place appointed for his, he compromised the matter, by agreeing that they should have the court-house in the forenoon, and he in the afternoon. This compromise seemed unnecessary, as the sheriff, clerk, and other officers were on his side, so that when Messrs. Evans and Claggett met, they had no grand jury, and no means of carrying on the business of the court. They, however, appointed a clerk, and Mr. Evans delivered a long address, condemning the late act of the legislature, and then adjourned till ten o'clock the next morning. In the afternoon Judge Livermore held his court, and, after the usual charge to the grand jury, observing that he had a communication to make to the people, he, to the astonishment of all present, made a strong and vehement address against the act under which he held his office, condemning it as unconstitutional, and arraigning the motives of the legislature that passed it, in terms exceedingly harsh and severe. He then adjourned the court till nine the next morning. In the morning he agreed with Evans and Claggett that they should take his hour and place, and he went to the meeting-house, where he continued from day to day, till they had finally adjourned. During the second week, the chief justice was present, and went on with the business of the court unmolested.

"The next session of the supreme judicial court, which was at Exeter, the third Tuesday in September, was holden by the chief justice and Judge Ellis.

Soon after they had taken their seats upon the bench, Messrs. Evans and Claggett entered the court-house, and seated themselves, one on the right, the other on the left, of the judges. The court was organized, as usual, by the chief justice, although his directions were all countermanded, and the sheriff refused to obey any but the late judges. For instance, after the clerk of the court had, at the request of the chief justice, administered the oath of office to the jurors, Mr. Evans ordered his clerk to repeat the ceremony, stating that the oath just administered was unauthorized and illegal. The chief justice expressed an opinion that this course could not be tolerated, and the jurors all refused to be sworn a second time. When the chief justice rose to charge the grand jury, he was interrupted by Mr. Evans, who said, 'Gentlemen, the act recognizing the court that is now about to address you, is unconstitutional. We acknowledge that these men (Smith and Ellis) are judges by appointment, but not judges of the superior court. They may have an inferior jurisdiction; with this court they have nothing to do.' The chief justice then delivered his charge, after which juries were organized, and the court proceeded to business, the defunct judges keeping their seats in silence. Judge Smith preserved throughout his usual suavity of manners, yielding to the caprices of Evans and Claggett, and permitting them to go through with any 'ceremony,' as he termed it, 'that they deemed it incumbent on them to perform.'

"In the afternoon the judges, finding the court-room occupied, went into another part of the house, and proceeded with the business before them, as if no interruption had taken place.

"In Hillsborough county the same farce was enacted, and with very much the same results. Had Messrs. Evans and Claggett been able men, supported, as they were, by a powerful political party, the most serious consequences might have ensued; but, as it was, their feeble and foolish efforts served only to bring them into contempt. They lost the little hold they had previously had upon popular sympathy, and their appeals to the public did far more to prove their own incompetency, than the unconstitutionality of the act by which they had been superseded. Great credit was due to Mr. Adams, the clerk, for his firm and judicious conduct, without which the embarrassments would have been almost insuperable. The forbearance, too, of the court, supported as it was by their distinguished and acknowledged ability, made a most favorable impression upon the public mind. 'It was the aim of the chief justice and Judge Ellis,' said Judge Smith, in his account of the proceedings at Exeter, 'to conduct with the utmost mildness, and to bear with any acts of rudeness, and even insult, offered to their persons, as far as they deemed consistent with the honor of the court and the administration of justice. They were willing to impute many things to ignorance and mistake.'

"After these ineffectual attempts to obstruct its proceedings, the new court was allowed to go on without farther molestation. A special session of the legislature was called by Governor Gilman, at which the sheriffs, who had refused to obey the orders of the supreme judicial court, were removed from office, but it was not thought expedient to pass any act with respect to Messrs. Evans and Claggett. The old court was left to die of inanition."

In 1816, the republican party having come into power, one of their first measures was to repeal the act of 1813, and Mr. Smith found himself again a practising lawyer. But after having secured a competency, he wisely resolved to quit the active duties

of the profession, and, in 1820, having reached the age of sixty-one, he retired from the bar. The remaining portion of his biography, although very interesting, we are obliged to pass over hastily. He was peculiarly happy in all his domestic relations. Mrs. Smith, a woman of good sense, and of a refined and delicate nature, though of a slender constitution, was always a devoted wife and faithful mother. And his son William, of whom a painfully interesting account is given, was evidently a young man of good abilities, but wanting in that industry and fixedness of purpose for which his father was remarkable. He was possessed, however, of a fine natural character, and was justly very popular with his associates, although there does not appear to have been much sympathy between him and his father, a fact which seems to account in some measure for his errors and ill success in life.

The favorite child of Judge Smith was his daughter Ariana. Mr. Morrison has devoted a considerable portion of his work to a description of the beautiful connection between the father and daughter; and we have seldom read anything in romance more deeply interesting. The account of her sickness and death is given in a simple and affecting style, and we regret that we have not space to present it to our readers. In 1827 Mrs. Smith died; — she was soon followed by Ariana.[1] In 1830, William died, and Judge Smith was left alone in the world. Those only can appreciate his loss who knew that delightful family, and how much his happiness was bound up in those he so deeply loved. But he did not despond. His cheerfulness did not desert him. Nor did he leave his usual avocations, but applied himself earnestly to study, and diverted his mind as much as possible from the grief

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[1] A plain marble head-stone marks Ariana's grave. The inscription upon it was prepared by her father; the Latin being slightly altered from Bishop Lowth's exquisitely written epitaph upon his daughter:

Ariana Elizabeth,
daughter of
Jeremiah and Elizabeth
Smith.
Born 28th December, 1797.
Died 20th June, 1829.

Cara, vale! Ingenio præstans, pietate, pudore,
Et plusquam natæ nomine cara, vale!
Ariana, vale! At veniet felicius ævum
Quando iterum tecum, sim modo dignus, ero.

This world was not the world
for thee.

that pressed upon him. He became much interested in the diffusion of useful knowledge amongst the people. He delivered several lectures before lyceums; — one in particular upon Washington, was repeated in many different towns.[1] In 1831 he was again married to a lady very much his junior in years, (her father was somewhat younger than himself), who survives him. By her he had one child. One of the most singular acts of his life was the sale of his place in 1842; where he had spent so many years of his life, and which was sacred to himself and his friends by the memory alike of the living and the dead. He was influenced in this movement by a regard to his wife and child, desiring to leave his property in a better condition than it would be if this place was a part of his estate. But we confess the act rather injures the romance of this part of his life. To coolly dispose of a situation so beautiful — where he had passed so many happy years — where most of the trees and flowers had been planted by the hand of the faithful wife of his youth, and the mother of his darling daughter,[2] was a very calculating affair, and perhaps in a business point of view, a fair operation; but it must have seemed hard to his old friends, and few will read his life without regretting it. He now prepared himself for the great change which he was aware he must soon meet, and calmly died at the house of his wife's father, in Dover, on September 21, 1842, at the age of more than fourscore and two years.

Such was the life and death of Jeremiah Smith, one of the most learned lawyers and remarkable men of his day. The friend, companion and co-laborer, during a large portion of his professional life, with Mr. Mason, Mr. Webster, and Mr. Sullivan, he formed with them the most remarkable galaxy of legal ability that any one state could boast of. He was unlike them all, but not inferior, upon the whole, as a lawyer. Without the massive power of Mr. Webster, or the condensed energy of Mr. Mason, or the eloquence of Sullivan, he was a more learned lawyer than either,

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[1] When it was delivered in Boston, Mr. Mason excused himself from some professional engagement, by saying; "I must go and hear Judge Smith *speak his piece*."

[2] Some of the readers of this volume would have been better pleased, perhaps, if Judge Smith had never married again, and had inscribed upon the grave-stone of his wife those beautiful lines of Lord Sterline:

> Oh, even in spite of death, yet still my choice,
> Oft, with the inward, all-beholding eye,
> I think I see thee, and I hear thy voice.

and as a man he was more beloved than all his cotemporaries at the bar.

We cannot close this notice without again alluding to the manner in which Mr. Morrison has performed his task. It was our intention to have made some criticisms upon a portion of the work, but our remarks have already extended to such a length that we must bring them to a close; nor do we regret that we are not permitted to point out blemishes in a work from which we have derived so much pleasure, and which we regard as the most interesting to New England lawyers that has appeared in a quarter of a century. We shall refer to it again, and draw liberally from its pages.

Recent American Decisions.

Supreme Court of Pennsylvania, March Term, 1845.

PAUL JONES *v.* JONATHAN LEVERING AND SARAH ANNE LEVERING.

It is not universally, or even generally, true that money which has come to the hands of a trustee by the act or consent of his colleague without positive negligence on the part of the latter, is chargeable indifferently to either.

The diligence required of a trustee, in taking care of the trust estate, is precisely the diligence which a man of ordinary prudence would practise in taking care of his own.

Held, therefore, that where joint guardians, in affluent circumstances and good repute, apportion the custody and management of the property, to suit the peculiar capacity and qualifications of each, but without surrendering the right of either to meddle with the whole, each is chargeable with no more than he received, unless he stood supinely by while his colleague was manifestly impairing the estate.

THIS was an appeal from the decree of the orphans' court of Philadelphia county, surcharging the appellant's account, as a joint guardian, with moneys received by his colleague. It was proved that these guardians were reputed to be men of probity, and that the colleague was a man of great wealth; and that, when their appointment was announced by the administrator of the ward's father, the appellant consented to accept the office only on the basis of an

explicit understanding that he was to manage the real estate, for which his pursuits had fitted him, and have nothing to do with the custody and investment of the moneys, for which his colleague was better qualified by experience and education. Matters stood on this foot for a few years, when the colleague suffered severe losses, which, however, did not shake his credit till 1838, and but slightly even then, as he was shown to have borrowed without difficulty between that year and 1841, when he failed. His insolvency began to be suspected by the appellant in 1838, who saw him sometimes importuned about his private affairs, and who, on requiring information of him about the trust fund, was told that it was invested in bonds secured by a mortgage of an estate which was pointed out. At the suggestion of the administrator, the appellant shortly afterwards consented to receive the moneys still outstanding; and for these he was ready to account; but the auditor, to whom the account had been referred, was of opinion, on the authority of *Bone* v. *Cooke*, (McClelland, 168,) *Oliver* v. *Court*, (8 Price, 127,) *Brice* v. *Stokes*, (11 Ves. 319,) and *Walker* v. *Simonds*, (3 Swanst. 1,) that he was chargeable with the whole; and his report was confirmed. The cause was argued here by *Cadwallader* for the appellant, and by *Hirst* for the appellees.

Gibson, C. J., delivered the opinion of the court. Parents, guardians, executors, receivers, and all who manage the estates of infants, are responsible as trustees, and held to the same degree of diligence; but for participation in the acts of their colleagues, the liability of executors is peculiar. In *Sadler* v. *Hobbs*, (2 Bro. Ch. R. 117,) Lord Thurlow admitted the rule to have been confirmed in *Leigh* v. *Barry*, (3 Atk. 584,) that an executor joining with his colleague in signing a receipt or conveyance, makes it his own; and he questioned the soundness of the decision in *Westley* v. *Clarke*, (1 P. Wms. 83,) in which Lord Northington had held a different opinion; but the master of the rolls subsequently said, in *Sanfield* v. *Howes*, (3 Bro. Ch. R. 94,) that he found no fault with it. The distinction is to be kept in view; for it might be shown that the instances in which a mere trustee has been charged with the defaults of his colleague, have been comparatively few. In the treatise of equity (Fonb. B. 2, ch. 785,) as well as in the opinion of the lord keeper, in *Fellows* v. *Mitchell* (1 P. Williams, 83,) the charging of an executor for signing his colleague's receipt, is put upon the foot of necessity and likened to confusion of goods, though it is obvious that the same difficulty in ascertaining how much had been received by each, is produced by the joint receipt of trustees. The true reason of the distinction seems to be, that it is unnecessary for

executors to join, and that, when they voluntarily assume the character of joint receivers, they agree to trust each other, and become joint accountants, while no such conclusion is to be drawn from the receipt of trustees who cannot choose but join.

Here the question touches the *liability* of *trustees* for each other's receipts, without joinder in the acquittances. The appellant was charged with the default of his colleague on the principle (Fonb. 185,) that where money gets into the hands of a trustee by any *act* or *agreement* of his colleague, both are chargeable with it, and that, if they agree that each shall have the management of a particular part of the estate, each shall be chargeable for the whole. There is certainly a dictum of Lord Thurlow in *Saddler* v. *Hobbs* to the effect of the first proposition; but *Gill* v. *The Attorney General*, (Hard. 314,) on which he relied, does not sustain it. That was the case of commissioners separately bound with sureties; each to perform all the articles and rules of the excise; and they were held not to be answerable for each other. That was the only point decided, and it turned on the interpretation of the bond. But it was said, in illustration, that, though an executor is chargeable for no more than comes to his hands, yet if executors agree among themselves that "one be to receive and meddle with such a part of the estate, and another with such a part, each of them will be chargeable with the whole, because the receipts of each are pursuant to the agreement made betwixt both."

This is the only thing, even in the shape of a dictum, which amounts to a recognition of the principle, and it was not predicated of trustees, but of executors, who have separate power to intermeddle and receive, without any agreement whatever. *Sanfield* v. *Howes*, also, was a case of executors who had joined in a receipt; and *Westley* v. *Clarke*, impugned the doctrine, as we have seen, even in the case of executors. But in *Fellows* v. *Mitchell*, Lord Cowper, speaking of the responsibilities of trustees, said, "it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the receipts, is but natural." Other cases are much stronger against the principle, as Mr. Fonblanque asserts it. In *Attorney General* v. *Randall*, (21 Vin. Trust. n. *a*, pl. 9,) one of three trustees to build an almshouse, called on the executors for the money, and was refused payment except on the joint receipt of all; whereupon he procured the signatures of the others, received the money, and failed at the end of five years. The lord chancellor said, "it would not be expected that all should meet together to receive; but if they had, either one must have

had the custody of the whole, or it must have been divided into shares. And if they entrust one of themselves for convenience, or necessity, when all are solvent, which is no more than making him their banker, shall equity punish where there is no default? And this is the very case of *Churchill* v. *Stopson*, (Holson.) And to charge trustees in such a case, would make the case of trustees very perilous, which are very necessary for the common good and convenience of families. And he said that he saw no reason why trustees may not make one of themselves their cashier, where there is no fraud; that this was a reasonable thing at the time, as R., (the receiver) was the only trustee who lived in London, where the money was paid. And as to an objection made to letting the money lie so long in R.'s hands, he said the case of R. differs from the case of a common banker, where the money may be drawn out at pleasure; but here R. had as good a right to the keeping of it as the others; and all paid out till about one third; and he was entrusted by the testator as well as the others. Now the joint receipt was signed in that case, for the very purpose of enabling R. to receive the money, which "got into his hands by act and agreement" of his colleagues, of a nature affirmative as a positive order would have been. Indeed, every joint receipt is such, and less negative in its character than a mere refusal to receive. I have extracted the opinion of the chancellor entire, not only because it embodies the good sense of all that has been said on the subject, but because every part of it may be applied to some feature of the case before us; and I shall add no more than that *Townley* v. *Chalenor*, (Cro. Car. 312); *Merrill* v. *Pitt*, (2 Wms. 570); *Leigh* v. *Barry*, (3 Atk. 584); *Churchill* v. *Hobson*, (1 P. Wms. 241); and *Applyn* v. *Brewer*, (Prec. Ch. 173,) powerfully support it. In declining to receive, the appellant did no more than every trustee does who signs a joint receipt for the purpose of putting the money into the hands of his colleague; and in limiting his active agency to that part of the business for which alone he was qualified, he acted on the same principle. Who will venture to say that the arrangement did not promise fairer to be beneficial to the wards than any other that could have been made; and if it was executed in good faith, why should it be made a ground of charge? The appellant was peculiarly fitted, by experience, for the management of real estate, but not conversant with pecuniary transactions; while his colleague had great experience in the business of investment, and in accounts, having often been an executor, an administrator, or a trustee. Guardians are sometimes chosen for the very reason that their qualifications are diverse, so that

each may take charge of those parts of the trust for which his previous pursuits have fitted him. Thus a lawyer might beneficially leave the management of his ward's furnace or forge to a colleague who had been bred an iron-master, while he himself attended to the collection of the debts, the settling of the estate, and the preservation of the title papers. Still, it must be admitted that a guardian commits a breach of trust when he parts, even for a time, with his right of joint control, so as to preclude him from exercising it when necessity calls for it; as in *Keble* v. *Thompson*, (3 Bro. Ch. R. 111,) where the one trustee lent the funds to the other. The appellant, therefore, is not chargeable merely for having declined to meddle with the moneys in the first instance; and the next inquiry is, whether he ought to have interposed before he began to doubt his colleague's solvency; or whether he ought to have been satisfied with the explanation given when he called on him for information about the investments.

The result will depend very much on what is the proper degree of a trustee's vigilance. In *Pybus* v. *Smith*, (1 Ves. Jr. 193); *Palmer* v. *Jones*, (1 Vern. 144); *Mann* v. *Ballet*, (Ib. 44); and *Homard* v. *Webster*, (Select Ca. in Ch. 53,) it is said that he is to be charged only for his own receipts, or for supine negligence, and where the proof of it is strong. Sir William Jones says, (Law of Bailm. 22,) that no more is required of the holder of another's property under a contract beneficial to the owner alone than good faith; that he is answerable for gross negligence only; but that in regard to a commission or mandate by which an affair is committed to another to be managed gratis, (and a guardianship is such) good faith itself requires that he use a degree of diligence adequate to the performance of the work. And this degree, it seems, was required by the civil law to be greater than he might, perhaps, think proper to exercise in his own affairs, (Ib. note 5,) not, however, I presume, more than he would exercise if he were a man of ordinary prudence. By this remark, I mean that one who undertakes the business of another as an unpaid agent, engages to exercise in the performance of it the same degree of vigilance that a man of ordinary prudence would exercise in the performance of his own. Now, though guardians and executors receive a sort of compensation for their services from the liberality of the court, they are of right entitled to nothing; and they stand with us, as to responsibility, as they do in England, where their services are gratuitous. But a guardian is compensated for services, not for risks; and as the law has no higher aim than to place the property of an infant on the same foundation of security as the

property of an adult, I take it, the appellant was bound to deal with the property of his wards only as it may be supposed they, as prudent persons, would have dealt with it themselves. Did he thus deal with it?

But beside having refused to become a receiver, he is accused of negligence, in not watching over the receipts and investments of his colleague. It is to be remarked that his appointment seems to have been procured by the administrator, and probably the family, with a view to his services in the management of the real estate, for which he was peculiarly qualified. There is no positive proof of the fact; but it may be inferred from the circumstances that the appellant was appointed without his knowledge, and that his acceptance was procured by the administrator, himself one of the family, upon an express understanding that the business of the guardianship should be apportioned. Under the civil law, the family council, as it was called, was a legal institution, whose influence in domestic concerns was decisive; and family arrangements are still so far regarded in courts of chancery as to be ground for sustaining agreements between parent and child, or between brothers, which would else fail for defect of consideration. It is not pretended that a stipulation of the administrator, with the assent of the family, would bind the minor children; but it is not too much to say that the family's approbation of the appellant's course, may legitimately weigh in a question of negligence. But without aid from that quarter, it seems, from the nature of the case, that he acted with extreme caution in leaving the management of the moneys to one who was better qualified for it in everything but personal integrity, and whose greater wealth afforded greater security against loss from insolvency. He acted not only with extraordinary disinterestedness, but with singular discretion; and did exactly what a wise and prudent man would have done.

Still, negligence is imputed to him in omitting to call his colleague to account, when fears of his solvency were actually excited in him. But the ground of these fears was very slight; and therefore less might justify him in dismissing them. Both then and afterwards, no one stood higher in public opinion than his colleague, as a man of integrity, business, and wealth; and that the appellant had no stronger reasons for suspicion, than that he had sometimes seen him called aside on private affairs by those who might be duns, evinces a very great degree of vigilant observation. But by those trifles, light as air, his suspicions were actually excited; and they impelled him to do what a cautious man might be expected to do. He inquired into the disposition made of the

moneys, and was told by his colleague, whose truth had never been questioned, that the whole was invested in bonds, and a mortgage on a landed estate, which was pointed out. To require him to have dealt with his colleague as a rogue, by demanding a sight of the securities, would require of him the highest and most exact vigilance; a degree of it that would ruin every guardian in the state. No rate of commission would compensate the risk incurred from such a trust; and no man of prudence in his own affairs, would accept it. Responsible guardians would not be had; and infants would suffer instead of benefiting by it.

It is urged that the appellant was bound to call his colleague to account, when he was so satisfied of the insecurity of the funds in his hands as to consent to become himself the receiver. These guardians were appointed in 1826; the prosperity of the one who has since become insolvent, received its death wound in 1831; its result was not suspected by any one but himself till after 1838, two years before his assignments, insomuch that he borrowed money in 1839, on bond and warrant, which has not been entered up till this day; and he borrowed money, a short time before his failure in 1841, which seems to have been unexpected by all but himself. It is true that the appellant consented, in 1838, to receive the residue of the money, at the administrator's suggestion of danger, for which no reason was assigned; and there was, consequently, very little in the suggestion to shake his confidence in his colleague's solidity. It is true, also, the mother testified that, six or seven years before 1841, when she was examined, the appellant confessed that he did not know what to think of his colleague, and that he himself would consent to be the receiver. This testimony is unworthy of confidence, inasmuch as it goes back to a period decisively anterior to 1838, the period material to the question.

Again, it is insisted, on the authority of *Bruce* v. *Stokes*, (11 Ves. 319,) and *Walker* v. *Symonds*, (1 Swans. 42,) that the appellant was guilty of laches, in suffering the money to be in his colleague's hands fourteen years, especially as the statute of 1821, since repealed, made it the duty of guardians to render triennial accounts, without being cited. It has always been the duty of an executor to file an inventory in a month from the date of the letters; but an omission to do so has never been thought a reason to charge him with a colleague's defaults. It is true that these two cases would go far to sustain the charge in this instance; but it is also true that there has at all times been more inconsistency of decision on this subject in the English courts, than in any other, and more than is to be found in our own books on all subjects together. Perfect

consistency is unattainable by any court, and perhaps our own decisions are not free from discrepancies in regard to principles which are not rules of propriety; but nothing done by any American court will bear comparison with the sweeping alterations made by the English judges, in the common law. On the subject before us, their decisions have been always loose; and we feel ourselves so far unfettered by foreign precedents, as to be at liberty to adapt the rûle of a guardian's vigilance to the business habits and transactions of our own people. If he were held liable for the omission of any imaginary measure of precaution which human sagacity might foresee, the principle of accountability would be impracticable, in a country where counsel cannot be consulted at every step, without incurring an expense which would often swallow the estate. Where the property is small, plain country farmers, unversed in the intricacies of the law, are for the most part prevailed on by the friends of the infants to take charge of it; and from those, justice requires no more than good faith and vigilance, adequate, under the circumstances, to reasonable performance. It certainly does not require that the office of a guardian should be a trap for the unwary. Here there was both good faith and reasonable diligence, and we direct the appellant to be charged with no more than he received.

Account reformed accordingly.

Circuit Court of the United States for the First Circuit, June, 1845, *at Boston.* — *In Equity.*

THOMAS C. GRATTAN, Administrator of the goods and estate of the late Sir John Caldwell, Baronet, *v.* WILLIAM APPLETON AND OTHERS.

Where A, an inhabitant of New Brunswick, deposited money in the hands of B, living in Boston, and directed B, in sundry letters, to remit the same to certain persons, in case of A's death, — it was *held*, in a suit in equity brought against B and such other persons by the administrator of A, after the death of the latter, that those letters must be treated as being a testament of personal property.

Held also, that the law of New Brunswick constituted the rule by which they were to be judged, as to their interpretation and validity.

Held also, that those letters being incapable of any legal operation to pass the property, the administrator of A was entitled to the funds.

Held also, that the costs and expenses of B were to be paid out of the fund, that the other defendants were not to pay or receive costs, and that no interest was to be paid.

This was a bill in equity to recover certain funds, amounting to $2882,81, in the hands of William Appleton, which he declined to pay over to Mr. Grattan, on the ground of a claim upon them by other parties. The defendant desired the determination of the court on the question who was the rightful proprietor of these funds. It appeared that Sir John Caldwell died at Boston on or about October 8th, 1842, and that at the time of his death his legal domicil was in the British province of New Brunswick. It further appeared that Mr. Appleton, having received certain funds of Sir John Caldwell into his possession, on or about January 14th, 1842, received from Sir John a letter in the following words:

Boston, 14th January, 1842.

William Appleton, Esq., Boston:—I beg to trespass on your friendship, by requesting that in the event of my death, occurring before I have the pleasure of seeing you again, that you will be so kind as to remit the proceeds of treasury bill for five hundred dollars, now in your hands, in a bill of exchange, and remit the same to E. H. Chapman, Esq., Leaden-Hall street, London, for the use of Miss Johnson, who is well known to him.

I remain, dear sir, your very truly obliged friend and servant,

John Caldwell.

The said letter enclosed the two following letters:

Boston, 25th April, 1841.

William Appleton, Esq., Boston.—My Dear Sir:—May I request the favor of your keeping the enclosed until you hear of my death, and then open it, as it conveys my wishes with respect to the disposal of what balance of mine may be in your hands.

Before that event takes place, I hope many times to have the pleasure of seeing you; it is, however, only right to be prepared for an event, which, sooner or later, must happen to us all. With many thanks for your late kindness, and apologizing for thus further troubling you, believe me, my dear sir, your very faithful and obliged friend.

John Caldwell.

Boston, 25th April, 1841.

William Appleton, Esq., Boston:—My wish is, that whatever balance Mr. Appleton may find in his hands after disposing of the Nashua stock, should be equally divided; one half to go to Mrs. Jacob Hathorne, of Dracut, near Boston, now of Lowell, and the other remitted to Miss Eliza Johnson. Information can be ob-

tained, respecting the latter, by inquiring of Mr. E. H. Chapman, merchant, Leaden-Hall street, London. JOHN CALDWELL.

The last letter was sealed and indorsed as follows:

"William Appleton, Esq., is requested to take charge of this packet in his safe, until he either sees or hears from Sir John Caldwell, or receives authentic intelligence of his death, when Sir John Caldwell begs he will be so good as to open it, and comply with the request therein contained. Boston, 14th February, 1842."

After the death of Sir John, Mr. Appleton opened the letter above mentioned, and the several inclosures therein. Mrs. Jacob Hathorne and her husband asserted, in their answer, that these letters constituted, in law or in equity, an assignment of the property in question. They further say "that the said Julia Hathorne is the daughter of the said Sir John Caldwell, by Mrs. Harriet Usher; and has always been, during his life, treated by him with the tenderest affection; and that the amount thus directed to be paid to her, was intended by him to be a last proof of paternal affection; and the assignment thereof has in law been founded on a good and legal consideration as they believe." Miss Eliza Johnson being at Bologne, out of the jurisdiction of the court, was not made a party to the bill, but notice of the proceedings was sent to her by the order of the court, and she was represented by the counsel for the Hathornes.

George S. Hillard and *Charles Sumner*, for the complainant.
Francis C. Loring, for Mr. Appleton.
William Whiting, for the other defendants.

STORY, J. By the provincial statute of the province of New Brunswick, where Sir John Caldwell (being a British subject) had his legal domicil, these letters, if they constitute a testamentary disposition of the property therein mentioned, are utterly void, as not being executed according to the provisions of that statute. Two questions, therefore arise: 1, Whether these letters constitute, in point of law, a testament or a testamentary disposition of Sir John Caldwell; 2, If they do, then, whether the law of the province constitutes the rule by which they are to be judged as to their interpretation and validity.

The letters must be treated as in their nature, scope and objects testamentary, or in other words, as being a testament of personal property. To constitute such an instrument, all that is necessary is, that it should clearly appear to be the intention of the party to have it operate after his death and not before. In respect to the second question, the rule now firmly established is, that the law of

the place of the testator's domicil is to govern in relation to personal property, although the will may have been executed in another state or country, where a different law prevails. These papers, therefore, are incapable of any legal operation to pass the property bequeathed therein. The plaintiff, as administrator, is entitled to the funds; but he is entitled to no interest on them, as Mr. Appleton is a mere innocent stakeholder, in no default, and it does not appear that he has made any interest. His costs and expenses are to be paid out of the fund, and the other defendants are not to pay or to receive costs.

A decree was entered accordingly.

Supreme Judicial Court of Massachusetts, June, 1845, at Boston. — In Insolvency.

IN THE MATTER OF MERRITT JORDAN.

The term "fraudulent conveyance," in the statute of 1844, c. 178, does not mean simply a conveyance that would be a fraud at the common law, but includes such a conveyance as was made void by the statute of 1841, c. 124.

To authorize a master in chancery to issue a warrant under the statute of 1844, c. 178, on the ground of a fraudulent conveyance, in the case of a mortgage to a creditor which would not be a fraud at the common law, the master must be satisfied, that the debtor was knowingly insolvent, or contemplated insolvency at the time that he made the mortgage, that he made it with a view of giving a preference to a preëxisting creditor, and that the creditor then had reasonable cause to believe the debtor insolvent.

The burden of proof is on the petitioning creditor to establish that the debtor was insolvent and that the mortgage creditor had reasonable cause to believe him insolvent.

The petition is the ground for the hearing, but the allegations therein are not to be treated as evidence. See *Foster* v. *Remick*, (5 Law Reporter, 406.)

The court refused to order a sale of property in the hands of the messenger.

THIS was a petition to the supreme judicial court, praying that a warrant which had been issued against the estate of Jordan, by Ellis Gray Loring, a master in chancery for the county of Suffolk, should be revoked and all further proceedings be stayed. The warrant issued on the petition of G. L. Knapp, who was a creditor of said Jordan, and set forth in his petition that, on the fifteenth

day of May last, the said Jordan, being insolvent, or in contemplation of insolvency, made a fraudulent conveyance by mortgaging the whole of his property to N. M. Bradbury & Co., with a view of giving them a preference, for a preëxisting claim, over other creditors; and that at that time the said N. M. Bradbury & Co. had reasonable cause to believe the said Jordan insolvent. On this petition, which was verified by oath, notice was ordered, and the said Jordan appeared, and pleaded not guilty of the charges in the petition, but refused to be sworn to the truth of the plea, or to be examined. It appeared in evidence, that on the fourteenth day of May, the said Jordan permitted his note, which was lodged in the bank for collection, to be protested, and on the following morning made a mortgage of his furniture and all his stock in trade to N. M. Bradbury & Co., to secure a note for $1500, payable in sixty days. There was also other evidence in the case introduced by the petitioner, and no evidence was offered on the part of said Jordan.

On a subsequent day, Mr. Loring delivered the following as the Master's opinion.

"On hearing this case, my opinion is as follows: The facts in the petition being verified by oath, and otherwise partially confirmed by legal evidence, or the respondent's admissions, and there being no sworn denial or rebutting evidence on the part of the respondent, the same appear to me to be true. I do not, however, include among the 'facts' the allegation that the respondent 'has made a *fraudulent* conveyance or transfer of his property;" the fraud being rather an inference from the facts, than a specific fact in itself. The question before me is, whether the transfer by the respondent of his stock in trade and furniture, made after his note had been dishonored, and with knowledge of his insolvency, to secure a preëxisting debt to a creditor acquainted with his circumstances, is 'a fraudulent conveyance,' within the meaning of the 9th section of the act of 1844, which makes a 'fraudulent conveyance' a ground for declaring a debtor insolvent. The petitioner contends that it is fraudulent, as being contrary to the policy of the insolvent law, and void by its express provisions. The respondent's counsel, on the other hand, contends that, in order to bring the debtor within the involuntary process of the insolvent law, it is necessary to prove that he made the conveyance 'in contemplation of his becoming insolvent, *and* of obtaining a discharge under the provisions of the act.'—Stat. of 1838, sect. 10. This was undoubtedly the law under that statute, and it was under it that the

case of *Gorham* v. *Stearns* was decided, (1 Metc. 367); but the law has been altered by the subsequent statute of 1844, ch. 124, sect. 3, which now provides that if the debtor, 'being insolvent, or in contemplation of insolvency,' shall give a preference to a pre-existing creditor, he shall forfeit his discharge, and that the conveyance shall be void if the preferred creditor had reasonable cause to believe the debtor insolvent.

"The present mortgage is therefore clearly contrary to the provisions of the insolvent law, as now amended. The present policy of the insolvent system of Massachusetts is the equitable division of an insolvent debtor's effects among his creditors; and is in this particular in harmony with the English bankrupt system. The provision in the English bankrupt law, (1 Jac. 1, ch. 15; 6 Geo. 4, ch. 16,) is nearly the same with that of our law of 1844. In both systems 'a fraudulent conveyance' by the debtor is, in terms, made the ground for issuing a commission or warrant. Now in England, it has been held for nearly a century, that a transfer by a trader, of the whole or nearly the whole of his property, is, *per se*, fraudulent, as being contrary to the policy of the bankrupt law, and therefore an act of bankruptcy. See 1 Chr. Bankrupt Law, 123, et seq.; *Worsley* v. *De Mattos*, (1 Burr. 467); *Wilson* v. *Day*, (2 Ib. 827.) In like manner, I hold the conveyance, in the present case, to have been fraudulent, as being contrary to the policy of the insolvent law, and void by the statute of 1841, as against creditors in insolvency. A warrant must accordingly issue against the debtor's estate."

At the hearing before the justices of the supreme judicial court, it was contended on the part of said Jordan, that even if the said Jordan was insolvent at the time of making the mortgage, and he and the mortgage creditor had full knowledge of it, and if he intended to secure one or more of his creditors to the exclusion of the rest, yet he had committed no act for which a warrant ought to issue under the insolvent act of 1844; — that the term "fraudulent conveyance" intended such a conveyance as would be a fraud at common law, and not such as might give a preference over other creditors.

William Brigham, for the petitioning creditor.
John C. Park, for Merritt Jordan.

Shaw, C. J., delivered the opinion of the court, to the effect, that the statutes of 1838, 1841 and 1844, were to be examined together. The statute of 1841 made certain conveyances void which were

not before void, and the term "fraudulent conveyance" in the statute of 1844 meant such a conveyance as was made void by the statute of 1841. To authorize the master to issue a warrant in this case, he must be satisfied of the following facts: (1.) That Jordan was insolvent or contemplated insolvency at the time that he made the mortgage, and that he did it with a view of giving a preference to a preëxisting creditor. (2.) That he then had no reasonable cause to believe himself solvent. (3.) That N. M. Bradbury & Co. at the time of receiving the mortgage had reasonable cause to believe Jordan insolvent.

The burden of proof of the first and third propositions was on the petitioning creditor; and he must prove them by competent evidence. The allegations in the petition were not to be received as evidence, the effect of the petition being only to authorize the master to hear the case. The debtor could not be called to testify without his own consent in the preliminary proceedings; and as the master had appeared to rely, in his opinion, on the allegations in the petition and the fact of Jordan's refusing to testify or answer under oath, they superseded the warrant, and remitted the proceedings to the master for a further hearing.

At a subsequent hearing, a warrant issued against Jordan's estate, by his own consent. After the issuing of the warrant, the messenger, Watson Freeman, made application to the court, praying for leave to sell the stock in trade belonging to the estate of Jordan, on the ground that a part of the same was perishable, and that the keeping of the stock would be attended with an expense disproportionate to its value. This application was assented to by the insolvent debtor, and such of his creditors as could be found. But the court refused to grant the application, upon the facts in this case.

Supreme Judicial Court of Massachusetts, January, 1845, *at Boston.*

MATTER OF JOSIAH OAKES.

A person who is insane, or delirious, may be confined, or restrained of his liberty, by his family, or by others, to such extent, and for such length of time, as may be necessary to prevent injury or danger to himself and others.

Such confinement and restraint may be in his own house, or in a suitable asylum, or hospital.

The repetition and frequent occurrence of acts, without any motive sufficient to actuate persons of ordinary sense, are evidence of aberration of mind; and, in such cases, accumulation of proof becomes important.

Such aberration of mind will authorize the restraint of the person subject thereto, although he has not committed any actual violence.

This was a case of habeas corpus, prosecuted to procure the discharge from confinement of Josiah Oakes, who was committed to the McLean Hospital for the Insane, on the 16th of December last. The case was heard before the whole court, and the hearing occupied the whole of two days. The application of Mr. Oakes's sons for his admission into the asylum was produced, and their agreement to pay his board. All the proceedings appearing to have been regular, the court ruled that the burden was upon the petitioner to make out a sufficient case for his discharge. A large number of witnesses were called, who testified that they were acquainted with Mr. Oakes, and considered him a man of much industry and shrewdness, and also that they should not have inferred, from his conduct or appearance, during the last three months, that he was not in his right mind. Several of them said, however, that his faculties might have been affected by age. To sustain the detention of Mr. Oakes, the deposition of Dr. Bell was read, and a number of witnesses were called, among whom were Dr. John Fox, under whose immediate charge the prisoner was at the asylum, several members of the family, and other acquaintances. They testified to some irregularities in the conduct and conversation of Oakes, and Dr. Fox gave it as his decided opinion that he was insane. It appeared that Oakes had formerly been confined in the Asylum for ten days, for a temporary alienation of mind, and was then discharged as cured. His wife died in October last, and for a short time previous, and since her death, a change in his appearance had been noticed.[1] After the testimony was concluded, the counsel who opposed the petitioner stated that it was a mere question of evidence, and that he did not consider it necessary to argue it to the court. The counsel on the other side made an argument in favor of the release of Mr. Oakes.

B. F. Hallett and *Geo. A. Smith*, for the petitioner.
Buttrick, of East Cambridge, against the petitioner.

Shaw, C. J., in delivering the opinion of the court, said that the

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[1] Mr. Oakes, who is sixty-seven years old, became infatuated after a young woman by the name of Sarah Jane Neal, and engaged to marry her a few days after the death of his wife. To prevent the marriage, prosecutions were commenced against her in the police court, by some members of the family, for lewdness of conduct.

court had examined the testimony, and bestowed upon the case the time and attention which its great importance demanded. The subject was one in which every member of the community has a deep and abiding interest. The power of granting relief upon habeas corpus is, in one sense, a discretionary power. But a discretionary power is not an arbitrary power. In exercising it the court are bound by the rules of law, as applicable to the facts of each particular case. The circumstances under which persons may be legally detained are extremely various, and a correct judgment in each case requires the exercise of judicial discretion.

Mr. Oakes has been placed in an insane hospital, a known public establishment, with a responsible board of trustees; and so far it has always been regarded as a satisfactory and useful institution. It may be called a boarding-house, or a place of relief, protection and cure for a person whose mind is diseased. It has been inquired by what power he is there confined? It has been argued, that the constitution makes it imperative upon the court to discharge any person detained against his will; and that by the common law, no person can be restrained of his liberty, except by the judgment of his peers, or the law of the land. But we think there is no provision, either of the common law or of the constitution, which makes it the duty of the court to discharge every person, whether sane or insane, who is kept in confinement against his will. The provision, if it be true, must be general and absolute, and not governed by any questions of expediency to suit the emergencies of any particular case.

The right to restrain an insane person of his liberty, is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. In the delirium of a fever, or in the case of a person seized with a fit, unless this were the law, no one could be restrained against his will. And the necessity which creates the law, creates the limitation of the law. In the case of an application to have a guardian appointed over the person and estate of an insane person, under the statute, some time must necessarily elapse before the appointment can be made, and during that time restraint may be necessary. If there is no right to exercise that restraint for a fortnight, there is no right to exercise it for an hour. And if a man may be restrained in his own house, he may be restrained in a suitable asylum, under the same limitations and rules. Private institutions for the insane have been in use, and sanctioned by the courts; not established by any positive law, but by the great law of necessity and humanity. Their existence was known and

acknowledged at the time the constitution was adopted. The provisions of the constitution in relation to this subject must be taken with such limitations, and must bear such construction, as arise out of the circumstances of the case. Besides, it is a principle of law that an insane person has no will of his own. In that case it becomes the duty of others to provide for his safety and their own. But whose duty does it become? If we say of his children, he may have no children; if of his parents, brothers or sisters, he may have no relatives who can perform the duty. Those who are about him must exercise it. His children, his wife, his brothers or sisters are suitable persons to take the charge of him if they are at hand. But a stranger, in a hotel or a boarding-house, may became delirious. In that case it becomes incumbent on those about him to restrain him, for such time only as the necessity for such restraint continues. The same rule may apply in the case of some surgical operations, where a person cannot have any will of his own, and it becomes necessary that he should be held by others.

The question must then arise, in each particular case, whether a person's own safety or that of others requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation. The physician of the asylum can only exercise the same power of restraint which has been laid down as to be exercised by others in like cases.

The present is one of the cases in which insanity must be inquired into by judicial tribunals. In such inquiries we must carefully keep in mind the object of the inquiry. The same rules do not apply to the same extent in this case, which apply in the case of a person who has committed a crime, and is sought to be excused on the ground of insanity. And when it becomes necessary to appoint a guardian under the statute, there, evidence of imbecility, improvidence or wandering of mind, without any dangerous form of insanity, becomes material, although it would not be in a case like the present. Many considerations have weight in one case which would have none in the other. We must not fall into the general notion, that a person is not to be considered insane, merely because he does not always show wildness of conduct in his every-day appearance. Since the subject has been scientifically investigated, we know that a person may show shrewdness and sagacity in his business, but still be decidedly insane on some one subject. There is one class of cases in which, at a par-

ticular period of life, a person's character appears to undergo a change, and the existence of a hallucination or delusion is shown, which cannot be removed by reasoning, argument, or persuasion. This species of insanity frequently shows itself in outbreaks of passion, on occasions where there appears no cause sufficient to produce them in a person of sound mind.

From a survey of the evidence we have come to the conclusion, that Mr. Oakes is laboring under such a delusion as renders it proper that he should be restrained, at least for a time. He has before been in the same hospital, and his cure after ten days' confinement at that time, indicates the proper course to be pursued now. That was a case of temporary alienation of mind, or excitement. Before his confinement he had made a contract to do a piece of work for Mr. Bowman, which he went on and completed immediately after his release; and Mr. Bowman testifies that the contract was a good bargain for Mr. Oakes. This shows that it was not a necessary consequence of insanity, that he should make an improvident contract. The general tenor of the evidence is, that Mr. Oakes was a careful, prudent, industrious man, attached to his children, and to his wife, and that the most perfect confidence subsisted between him and his wife. He resided at Cambridgeport for a time, and afterwards at East Cambridge. His business was wharf building, and pile driving, which he conducted with prudence and success. He was a man of strong feelings and passions, easily subject to excitement, which however readily subsided. This is usual with persons of much energy of character. In 1839, or later, according to the testimony of some witnesses, he manifested a change of character. He occasionally ill treated his wife, and frequently used harsh language. He had been quite a domestic man, but now began to be frequently absent in the evening, causing anxiety to his family. His wife died in October last. He did not manifest the feeling upon that occasion, which was to be expected from a person in his right mind. On the evening when his wife was in a dying condition, of which he was informed, he left the house, and passed the evening at a house in Boston, in the company of the person to whom he afterwards became engaged. When he came home, he asked if his wife was dead, in a manner which exceedingly shocked the feelings of his daughters. His conduct at the funeral showed a perversion of mind. It may be said, that this was a consequence of his resenting the attempt of the family to put him under guardianship, and confine him in the insane hospital. But he did not manifest such resentment. When speaking upon the subject, he said that they

were not to blame, for they supposed he was really insane. To a man acting under ordinary motives and feelings, such resentment, although it might be naturally felt for the time, could not be lasting.

On considering his state of mind, his alternations of depression and excitement, we think he did not act from ordinary motives and feelings. His persisting in his intention to marry the young woman who has been spoken of, and refusing to believe the evidence of her bad character, are indications of this. It is in evidence that he positively declared to his friends, who were much shocked at his declared determination to be married, that he would not marry the girl under six months; and afterwards made repeated attempts to have the ceremony performed within two months of his wife's death. The fact of an old man, a widower, wishing to marry a young wife, is not of itself evidence of insanity. But the circumstances, and the conduct of Mr. Oakes, attending the proposed marriage, are evidence that he was laboring under a hallucination of mind. His refusal to believe any evidence of the girl's bad character, his unlimited confidence in his own knowledge, his letters to Governor Morton and to his son, all show the morbid excitement of his mind. The testimony of Dr. Fox, the physician at the asylum, is important. His comparison of the tenor of his conduct and appearance with his conduct and appearance at the time he was before confined in the asylum, serves to show his state of mind. He has always, when in this state, said he could at any time make a large fortune in a short time, — could become independent again in a few months, if he should lose all he had, — that it was impossible that he could make a bad bargain, — and that he must always make money, — it could not be otherwise. He declared that he would not believe the character of the girl to be bad, although she should be convicted, — that he knew better than all the courts and the juries.

Dr. Fox testifies that he has no doubt that Mr. Oakes is insane. His opinion must have great weight in this case, from his skill and experience in the treatment of insanity. He has had the care of insane persons for a long time. If we cannot rely upon the opinion of those who have the charge of the institution, and there is no law to restrain the persons confined, we must set all the insane at large who are confined in the McLean Asylum. He thinks it dangerous for Mr. Oakes to be at large. Dr. McLellan, a physician at East Cambridge, whose testimony is in the case, expresses a different opinion. He says he had a conversation with Mr. Oakes of about twenty minutes. He could discover no indi-

cations of an insane mind. He knew nothing of the character of the girl, or of the facts and circumstances of the case, except as they were stated to him by Mr. Oakes. It is well known that persons laboring under a delusion often reason with sagacity upon false premises. On the other hand, Dr. Fox is bound by his duty, his profession, and his responsibility to the public, to bestow a careful examination upon cases like this, and his opinion may well overbalance one which is formed upon so cursory an interview as that of Dr. McLellan's. Mr. Tyler, the steward of the institution, confirms the statement of Dr. Fox, as to the appearance and conduct of Mr. Oakes. It is not necessary to consider the deposition of Dr. Bell, as it would not vary our conclusion upon the case.

No objection can be made to the competency of the children as witnesses. If there were anything to justify a belief in a combination of the family for sinister purposes, they would not be entitled to much confidence. But their testimony appears candid and unobjectionable, and there is nothing which shows any improper design. A unanimity of purpose in the family is no evidence of sinister intentions, unless the object sought to be obtained by the combination is unlawful or improper. The object here appears entirely laudable, and intended for the good of a parent whom they love and respect. If they considered the marriage as a rash act, and a consequence of his insanity, they were justified in attempting to prevent it. His earnestness in obtaining the publication of an article which his son and the printer considered libellous, and his giving a bond, in the unnecessarily large sum of $10,000, to save the printer harmless, show that his mind was morbidly excited. It has been objected that one of the sons prepared the bond, and said that he thought he would see how far his father would go into the matter. But he was requested by his father to put it in shape, and he at the same time enjoined it upon the printer not to publish it. The father showed a determination to carry the matter through, and had other legal advice besides that of his son.

Mr. Oakes's eagerness to engage in a large speculation in real estate, as stated by Dr. Parkman and Capt. Richardson, and his conduct in regard to it, are also in point. The fact of a person's engaging in extravagant or daring speculations, is not of itself sufficient evidence to prove him insane, but the manner in which Mr. Oakes conducted the affair, shows his mind to be unsound. Dr. Parkman saw, by his elevation of manner, that he was not in a fit state to conclude the large purchase which he desired to make, and refused to make the bargain unless he would get the consent of his family. Mr. Oakes, under the delusion that such consent was the

only obstacle to his wishes, went to his son-in-law, Mr. Houghton, told him he would give him $100 to go to Dr. Parkman, and give his consent, and took out the money at the time and offered it to him. He afterwards went to Capt. Richardson, his brother-in-law, who lives in Duxbury, and offered to give him $50 a day to come with him to Boston, and go to Dr. Parkman and give his consent.

The repetition, and frequent occurrence of acts, without any motive sufficient to actuate people of ordinary sense, necessarily induces a belief that the person who commits them, is under a delusion. In cases of this kind, accumulation of proofs becomes of considerable importance. It will not be necessary to examine the proof on the other side at any considerable length. It is not any want of sagacity in his usual business transactions which induces us to think Mr. Oakes insane, but his evident hallucinations, and his acting under unnatural excitement upon certain points. His overseeing his business correctly, and carefully seeing that the piles were driven well, does not prove him to be sane. He was under no delusion on that subject. His directions to Whitwell, the constable, showed only the shrewdness which frequently accompanies insanity.

Taking all the evidence together, we are of the opinion that Mr. Oakes is under the operation of that degree of insanity, which renders it proper that he be restrained in the hospital; that his insanity is temporary in its character, and that the restraint should last as long as is necessary for the safety of himself and of others, and until he experiences relief from the present disease of his mind. Dr. Fox does not say positively that he considers his being at large as dangerous to others. But this species of insanity leads to ebullitions of passion, and in these ebullitions dangerous acts are likely to be committed. If committed, he would be excused from punishment on the ground of insanity. His daughters testify, that, if he carried weapons, they should be afraid of him. But there would be the same danger from weapons which might happen to be at hand, at the time of any occasional outbreak.

At present we think that it would be dangerous for Mr. Oakes to be at large, and that the care which he would meet with at the hospital, would be more conducive to his cure than any other course of treatment. It is, therefore, the order of the court, that he be remanded to the McLean Asylum, to remain there until further action upon the subject.

Digest of American Cases.

Selections from 11 New Hampshire Reports.

ACTION.

The property of the defendant was attached upon mesne process, and the plaintiff, with two others, gave the officer a receipt for it, promising to deliver it on demand; and it remained in the possession of the defendant, with the assent of all the receipters. Afterwards, the plaintiff requested the others to join with him in a demand of the property, and in a suit against the defendant, but they refused — *Held*, that the plaintiff could not maintain an action in his own name against the defendant, for the property, although the other receipters were insolvent. *Bowman* v. *Gove*, 265.

AGENCY.

Where an agency, constituted by writing, is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person who deals with him as agent, on the faith of it, without any notice of the revocation, the act of the agent, within the scope of the authority, will bind the principal. *Beard* v. *Kirk*, 397.

2. A town having a right in a meeting-house, voted to sell it by auction, upon certain terms of sale prescribed by them, and appointed the defendants a committee for that purpose. They accordingly advertised the property, and in addition to the conditions prescribed by the town, they provided that $20,00 of the purchase money should be paid at the time of the sale, to be forfeited to the town if the purchaser should not complete the contract. The plaintiff was the highest bidder, but refused to make the deposit required, and the defendants thereupon refused to make a conveyance of the property to him. The plaintiff then brought this suit, on account of such refusal by the defendants.

Held, that it was competent for the defendants to require the deposit to be made, as it was calculated to enable them to effect the purpose of the town by insuring a sale; and that, as the plaintiff had not made the deposit, this action could not be maintained.

Held, also, that even if the defendants had no authority to require the deposit to be made, for a refusal to convey they would be liable to no persons but their employers. *Goodale* v. *Wheeler*, 424.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Where a negotiable note is indorsed *bonâ fide*, before it is due, in payment of a precedent debt, without notice of any defence existing against it; the transfer is as valid, perfect and effectual, as if it had been received in payment for goods sold, or in the course of any other commercial dealing. *Williams* v. *Little*, 66.

2. But where a note is indorsed and transferred in pledge merely, as a collateral security, the general property remaining in the indorser; the indorsee takes it like a chose in action not negotiable, subject to any defence that might be made to it in the hands of the indorser, arising prior to the time when notice is given of the indorsement. *Ib.*

3. If it be law that a party to a negotiable instrument, shall not testify to facts which show it void in its creation, because the policy of the law favors the circulation of negotiable paper, and aims to give confidence to subsequent holders, the exception to the rule which permits him to testify to facts which occurred after the execution of the note, showing it to be void, is unsound; for

he may equally defraud innocent holders, by proving that he, without the assent of the surety, and after its execution, altered the note.

But this rule is not law. In a suit by the *bonâ fide* indorsee of a note against the surety, the principal, being released by the surety, is a competent witness for him to prove that the maker, after the execution of the note, and without the knowledge of the surety, at the request of the payee, altered the note by inserting the words, "or order," therein. *Haines* v. *Dennett*, 180.

4. The insertion of such words is a material alteration of the note, and renders it void in the hands of an innocent indorsee, as against the surety. *S. C.*

5. The case of *Houghton* v. *Page*, 1 *N. H. Rep.* 60, overruled; which holds that one of the makers of a note is not competent to prove that it was given upon an usurious consideration. *Ib.*

6. An action may be sustained upon a negotiable promissory note, in the name of a third person, to whom it has been indorsed for the purpose of collection, and who has no interest in the suit except as a trustee. *Edgerton* v. *Brackett*, 218.

7. Where the defendant had affixed his name on the back of a promissory note, when made, drawn payable to the plaintiffs, or their order, but which had not been indorsed by them — *Held*, that the defendant thereby rendered himself liable as an original promiser, and not as an indorser. *Martin* v. *Boyd*, 385.

8. A promissory note for the payment of a certain sum of money, but executed for the purpose of indemnifying the payee against his liability as a surety for the maker on an administration bond, and to enable him to secure himself by an attachment of the property of the maker, is a valid contract, notwithstanding the payee at the time of its execution has not been damnified; the existing liability, with an implied promise to pay that amount upon the principal indebtedness, forming a sufficient consideration for the note. *Haseltine* v. *Gould*, 390.

9. But the payee will not be entitled to judgment upon it, for any greater sum than the amount he has paid, or assumed to pay, upon his liability as surety, prior to the judgment. Beyond that sum, if less than the amount of the note, the consideration must be deemed to have failed. *Ib.*

10. Where an alteration appears on the face of a promissory note, it will not vitiate the note if it is shown to have been made before its delivery to the payee, or with the assent of the maker. *Hills* v. *Barnes*, 395.

11. But in the absence of all evidence, either from the appearance of the note itself, or otherwise, to show when the alteration was made, it must be presumed to have been made subsequent to the execution and delivery of the note. *Ib.*

12. F. held a note against L., the defendant, and being indebted to P., had expressed an intention of delivering the note to P. as security for the sum he owed him. Subsequent to this, F. being on his death bed, and insensible, his wife delivered the note of L. to P., and P. gave up his claim against F., and gave a note payable to F., for the balance, which was delivered to his wife. L., with a knowledge of these facts, paid the contents of the note to P. — *Held*, that as F. had never carried his intention of delivering the note to P. into effect, nor authorized any one to do it, no title passed to P., and that the payment by L. to him did not discharge the note. *Davis* v. *Lane*, 512.

13. D., the plaintiff, was consulted respecting the transfer to P., and advised to it. He was afterwards appointed administrator on the estate of F. — *Held*, that this advice, given when he had no authority respecting the matter, could not operate to charge him as administrator with the amount of the note against L., nor preclude him from maintaining a suit against L. to recover it — *Held*, farther, that it was necessary, in order to sustain such suit, that the note P. gave for the balance should first be returned to him. *Ib.*

14. Where a member of a firm, without the assent or authority of his partners, affixed the signature of the firm to a note, in payment of a prior note of his own, signed by himself, and surety — *Held*, that such new note was wholly void as against such partners.

Also, that the original note remained undischarged by such attempted payment, and that its amount might be recovered in an action against the princi-

pal and surety for money had and received. *Williams* v. *Gilchrist*, 535.

15. Such attempted arrangement operates as no delay of payment, and will not exonerate the surety. *Ib.*

BOUNDARIES.

Where a deed or grant of land is bounded upon a river not navigable, the boundary line extends to the centre of the stream, including the water, the bed of the river, and all islands, unless there be an express reservation to the contrary. *Greenleaf* v. *Kilton*, 530.

2. Evidence may be admitted in some cases to show that the parties affixed a different meaning to the term river, and established an actual line in conformity to such understanding, which might limit their grant. *Ib.*

3. Any evidence of conflicting occupation or declarations of uncertainty as to the extent of their claim, will have no such effect. *S. C.*, 531.

CONFLICT OF LAWS.

The law of the place under which an ancillary administration is taken, must govern the distribution of the assets, in the payment of debts there. *Goodall* v. *Marshall*, 88.

2. But the distribution of the estate among the heirs or legatees, is to be made according to the law of the domicil of the testator, or intestate, at the time of his decease. *Ib.*

3. Where a person domiciled in another government, dies, leaving personal property in this state, and an ancillary administration is taken out here, and the estate represented insolvent, all the creditors of the deceased are entitled to prove their claims against the estate here, and to have the real as well as the personal estate appropriated in satisfaction of their demands. *Ib.*

4. Where an estate is represented insolvent, all the creditors may pursue their claims, and have them allowed, in every government where administration is taken; for the purpose of availing themselves of all the estate of their debtor, until they have obtained payment of their debts. *Ib.*

CONFUSION OF GOODS.

Where A. mingles and confuses his property with that of B., so that the separate property of each cannot be distinguished, whether B. thereby becomes entitled to the whole, or whether there be not a distinction between the fraudulent and the innocent confusion of goods, so that in the latter case B. would not be entitled to the whole, *quere?* *Barron* v. *Cobleigh*, 558.

CONTRIBUTION.

The doctrine of contribution is not founded on contract, but is the result of general equity, on the ground of equality of burthen and benefit, and is equally so among principals as among sureties. *Fletcher* v. *Grover*, 368.

2. It would seem that a discharge of one surety, discharges the other sureties for such proportion only of the debt, as, upon a payment of the whole debt, they would be entitled to have recourse to him for. *Ib.*

3. When joint promisers, or co-sureties, have received equal benefits, or been relieved from common burthens, neither is entitled to recover over against another, except for the excess paid by him, beyond his due proportion, or equal share. *S. C.*, 369.

4. The rule of law seems to be, that where joint promisers, or co-sureties, have received equal benefits, or been relieved from common burthens, each is entitled to recover over against the other, contribution for the excess by him paid beyond his due proportion, or equal share. *Boardman* v. *Page*, 431.

5. Where an action is commenced by the holder of a note against all the co-signers, and judgment recovered against one only, upon payment of the damages and costs of the judgment, the party against whom the judgment is recovered is not entitled to contribution from the other co-signers in respect of the costs — the same not being a burthen common to all the co-signers of the note. *Ib.*

6. The discharge of the direct liability of one co-signer to the holder of a note, will not avail him as a discharge from his liability for contribution to the other co-signers, unless the dischage be of a character to discharge and release the others also, and one of which they might avail themselves as a discharge, whether the discharge from the direct liability be the result of the contract of the holder of the note, or of the operation of the statute of limitations. *Ib.*

7. And, generally, it would seem

that, so long as the direct liability of any of the co-signors of a note to the holder or promisee shall continue, by virtue of the original contract, and not depending upon any new promise not contemplated by the original contract, the liability of the other co-signers for contribution will continue also, although they may be discharged from direct liability to the action of the holder or promisee. *Ib.*

8. An exception to that general rule may be found to exist, depending upon the provisions of special statutes, as in the case of acts of bankruptcy or insolvency, in which, at the same time that it is provided that the direct liability of the bankrupt or insolvent to the promisee shall be discharged, provision is also made for the limitation of the remedy of sureties, or co-promisers, to the assets in the hands of the assignees. *Ib.*

9. Where there are several co-signers of a note, and one pays the whole, but before payment some of the co-signers remove from the state, such removal is to be considered as having the same effect as if they were proved insolvent; and accordingly the party paying is not bound to seek his remedy against those co-signers in the foreign jurisdiction, but may recover by way of contribution of each of those remaining within the state, an equal share of the whole sum paid. *Ib.*

CORPORATION.

A charter, granting to certain individuals the right to organize and form a corporation, with power to construct a turnpike road, take tolls, &c., is a contract within the protection of the clause in the constitution of the United States, prohibiting the several states from passing laws impairing the obligation of contracts. *Backus* v. *Lebanon*, 19.

2. But this does not exempt the property of the corporation, including the franchise, from the power of eminent domain, or from contributing, like other property, to the public burdens. *Ib.*

3. It does not impair the obligation of the contract to take the property for public use, even if the powers of the corporation are thereby suspended, or the corporation itself in fact dissolved. *Ib.*

4. The construction of a turnpike road, by a corporation chartered for that purpose, does not preclude the exercise of the power of eminent domain, in providing for a free public highway over the same ground. *Ib.*

5. Nor will a provision in the charter of the turnpike corporation, by which the state reserves the right to purchase the property, after a certain period, at a certain price, prevent the legislature from taking the property for a public highway, in the ordinary mode. *S. C.*

6. The original proprietors of townships in this state are regarded as corporations, and are subject to the same general rules and regulations, and are invested with similar powers of corporations. *Atkinson* v. *Bemis*, 44.

7. Such proprietors may convey, or make partition of lands by deed, or by vote of the proprietary. *Ib.*

8. A copy of such vote from their records is *prima facie* evidence of title against the proprietors, and against any one who enters, as a mere trespasser, claiming no title. *Ib.*

DAMAGES.

Where a grantee with warranty purchases in a paramount title, upon which he has been ousted or disturbed, he cannot recover in damages more than the amount he has paid to extinguish such title, with a compensation for his trouble and expenses. *Loomis* v. *Bedel*, 74.

2. The question whether a sum inserted in an agreement to secure the execution of a deed, is a penalty, or liquidated damages, is to be determined by the intent of the parties, as gathered from an examination and construction of the whole instrument. *Chamberlain* v. *Bayley*, 234.

3. Where a party agreed to convey a certain tract of land for twelve hundred dollars, a part of which was paid down, and was to be received as part of the consideration money if such purchase was not completed, or of the damage, if the contract was not performed; and the party covenanted, if he did not conform to his agreement, he would pay five hundred dollars as a forfeiture — *Held*, that this sum was liquidated damages. *Ib.*

4. The plaintiff consigned books to the defendant at New York, for sale on commission, and the defendant, among other things, agreed to cause them to

be insured. He neglected to procure an insurance, and the books, while in his possession, were destroyed by fire. In an action upon the contract, it was *held* that the plaintiff was entitled to recover the value of the books, because, in the absence of all other testimony, a contract to insure must be construed to mean a contract to insure them at their value. *Ela* v. *French*, 356.

DEED.

Where a party conveys all his right, title and interest in certain lands described in the deed, and covenants to warrant and defend the premises against all lawful claims arising under him, the covenant refers to the lands described in the deed, and not to the right and title of the grantor. *Loomis* v. *Bedel*, 74.

2. The defendant conveyed to the plaintiffs land described as, "beginning at a beech stub, marked; thence south, about 61 degrees east, about 170 rods, to Sunapee Lake, on the line of land formerly owned by Abial Cooper," &c. &c.; and covenanted that he was seized of the premises. It appeared that Cooper's land extended south 66 degrees east.

In an action on the covenant of seizin, it was *held*, "that the line of land formerly owned by Abial Cooper," was a monument which would control the courses and distances; that by such description the land conveyed was bounded on the line of Cooper's land: that the deed did not purport to convey land owned by Cooper; and there was no breach of the covenant of seizin. *Breck* v. *Young*, 485.

3. On the 10th day of February, 1831, the executors of W. C., having entered upon and surveyed the land in question, conveyed it, with other land adjoining, to the defendant Young, who, on the 5th day of November, 1832, conveyed one undivided half of it to March. On the 27th day of January, 1837, Young and March conveyed the land to the plaintiffs, with covenants of seizin, &c., &c.

It appeared that in the year 1832, and for several years following, Young cut timber on the land conveyed to him; but it did not appear whether or not it was on the land conveyed to the plaintiffs. In 1833, and for several years following, March cut timber from the land in question.

In the month of April, 1835, one Bailey went upon the lot conveyed to the plaintiffs, claiming it as his, and in the spring of the year 1836 he cleared a part of it, and subsequently from time to time, cut timber from the lot. Bailey had no title to the land, other than by his entry aforesaid.

Held, that the entry by Young, in the year 1833, upon the land conveyed to him by the executors, gave him possession of all the land included in his deed from them.

Held, also, that Young and March, having entered under color of title, were seized of the land as against Bailey, who had no title; and that the entry by Bailey on the land subsequent to the deed to the defendant, and to the defendant's possession, was not evidence of a breach of the covenant of seizin in the deed of the defendant to the plaintiffs. *Ib.*

DEMAND.

A demand at the dwelling-house, and in the absence of a party who has contracted to deliver specific articles on demand, is sufficient to charge him with the value of such articles. *Remick* v. *Atkinson*, 256.

EQUITY.

While a creditor has the body of his debtor in execution, his right to proceed against his property, by virtue of the judgment, is suspended; and he cannot file a bill in chancery, founded upon the judgment, to reach the debtor's equitable estate. *Tappan* v. *Evans*, 311.

2. But he may, notwithstanding, proceed to foreclose any mortgage he may hold for the security of the debt, and to remove any fraudulent incumbrances upon the mortgaged property. *Ib.*

3. When matter, in bar of the relief sought, is apparent on the face of the bill, the defendant may demur. If the matter of defence is not apparent upon the bill itself, the defendant, if he means to take advantage of it, ought to show it either by plea or answer. If he does none of these, but answers fully to the merits, he may be held to have waived any matter of objection which he might have pleaded. *Ib.*

4. Where the ground of equitable jurisdiction is the discovery of facts solely within the knowledge of the de-

fendant, it is sufficient, to sustain the jurisdiction, that a discovery is had of facts which are material to the case. *Ib.*

5. In cases where a debtor fraudulently withdraws his property from execution, a bill in equity may be sustained, to reach his choses in action, in behalf of a creditor who has exhausted his remedy at law by a judgment, and execution returned that no property is to be found. *Ib.*

6. Where property is subject to execution, and a creditor seeks to have a fraudulent conveyance, or obstruction to a levy or sale, removed, he may file a bill in equity as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. If the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted by an actual return upon his execution, that no goods or estate can be found, before he can file a bill to reach the equitable property, or choses in action of his debtor. *Ib.*

7. An objection that the plaintiff shows no lien, and no judgment existing upon which he has proceeded, or can proceed, against the property of the debtor, may be taken at the hearing. *S. C.*, 312.

8. The fact that a mortgagee has instituted an action at law for the recovery of the premises, which is pending, is no bar to a bill in equity, filed against the same defendant, alleging that he claims under a fraudulent title. *Ib.*

9. Where a matter of fact is contested upon a bill in equity, the court may direct an issue to be tried by the jury. *Ib.*

10. Where the condition of a bond was, that if the obligee should pay a sum of money within a year, the obligor should re-convey certain lands; and in a bill in equity, to enforce a re-conveyance, it was alleged that the obligee made a tender on the 14th of April, and within the year; but the evidence showed the tender to have been made on the 8th of April — *Held*, that the allegation that the tender was made within the year, embraced the tender on the 8th, and that the proof was sufficient. *Buffum* v. *Buffum*, 451.

11. The bill should allege that the party is ready to pay the money. But if this is omitted, the court may relieve the plaintiff, by permitting him to bring the money into court. *Ib.*

12. Where, upon a bill in equity, the case is committed to a master, to state an account between the parties, the account may be taken either by requiring the parties to bring in debtor and creditor accounts under oath, or by examining them on interrogatories; or both modes may be combined, which is the better practice. *Hollister* v. *Barkley*, 501.

13. Where the parties, after the case was referred to a master to take an account, filed what was called an amended bill, and an amended answer — the first containing a statement by the plaintiff of his claims, with interrogatories to the defendant, and the latter containing the statement of the defendant, with answers to the interrogatories — *Held*, that they were to be regarded as part of the examination before the master, on taking an account. *Ib.*

14. Where an allegation in an answer is responsive to the bill, the plaintiff, if he seeks to impeach the answer upon that point, must overcome it by something more than testimony of a single witness; but it is not necessary that there should be two witnesses, or matter equivalent to two. *Ib.*

15. A judgment at law upon the same point, duly rendered in a suit between the parties, is a bar to relief in equity. *Ib.*

16. In taking an account before a master, witnesses may be examined before him, or on interrogatories, and one party may prove the admissions or declarations of the other, relative to the subject matter. *Ib.*

17. The statements of a party under oath, upon the taking of an account, cannot have the character or effect of matter in an answer responsive to a bill, except, perhaps, so far as they are answers to the interrogatories of the other party, or explanations of such answers. *Ib.*

18. The admission of a fact, by the defendant, in his answer, must be held conclusive against him, notwithstanding he exhibits evidence before the master tending to show that he made the admission under a mistake. If the defendant has made a mistake in his an-

swer, he can be relieved by leave to amend, or to file a supplemental answer. *Ib.*

19. In making up the partnership account, where a partnership has been dissolved, one partner cannot be charged with debts due to the partnership merely because he has not collected them, nor because he has refused to permit the individual debts of the other partner to be set off against them. *Ib.*

20. Interest may be allowed in equity on all sums due and payable, or from the time when a rest should be made in the accounts. The practice of the parties may be followed, or annual rests allowed. And the period of the dissolution of the partnership is a proper time to make a rest. *Ib.*

ESTOPPEL.

The bailee of goods attached by a deputy sheriff, who gives a receipt therefor, promising to re-deliver them to the sheriff on demand, and who afterwards converts them to his own use, is not estopped by such receipt from showing, in an action of trespass brought against him by the debtor, that the goods were his own property. *Barron* v. *Cobleigh*, 557.

EVIDENCE.

It is only when a party claims title, through deeds which have been recorded, that he is entitled to use office copies in evidence, without an effort to produce the original. *Loomis* v. *Bedel*, 74.

2. Where a witness testified that he was present at a conversation, and made a memorandum of it immediately after it took place; that he had now no recollection of all the particulars, but that he had no doubt that the facts stated in the memorandum were true; and that he should have sworn to them from recollection within a short time afterwards — the memorandum was admitted in evidence, in connection with his testimony, to show the particulars of the conversation. *Haven* v. *Wendell*, 112.

3. Charges upon a physician's bill, for "visits and medicines," are sufficiently specific, although the quality and quantity of the medicines are not designated — it not appearing that they varied from the usual mode adopted by physicians in making charges. *Bassett* v. *Spofford*, 167.

4. The book of accounts of a party, supported by his oath, is competent evidence to prove the payment of sums of money not exceeding $6 67. *Ib.*

5. The maxim, "*nemo allegans turpitudinem suam est audiendus*," is not a rule of evidence regulating the admission of testimony, but a principle applicable only to the right of a party to recover. *Haines* v. *Dennett*, 280.

6. The presumption is that a party continues to live, until some evidence is offered to rebut it. But evidence that he has not been heard of for the term of seven years, rebuts this presumption of the duration of life. *Smith* v. *Knowlton*, 191.

7. In such case the death is not generally presumed to have occurred until the expiration of the time. *Ib.*

8. The jury may find, as a matter of fact, that a party died within a much less period after he was last heard of, on circumstantial evidence which leads their minds to such a conclusion. *Ib.*

EXECUTORS AND ADMINISTRATORS.

An executor or administrator is not bound to interpose the general statute of limitations in bar of the recovery of a demand against the estate, which is otherwise well founded. *Hodgdon* v. *White*, 208.

2. And he may have a license for the sale of real estate, in order to pay claims barred by the statute, but admitted by him, and appearing to be just. *Ib.*

3. But if, on application for a license to sell, evidence is offered tending to show that the demands for the payment of which the license is asked, have been paid; or if they are so stale that, aside from the statute of limitations, a strong presumption arises against their validity, that will form a sufficient ground upon which the court in its discretion may refuse to grant a license. *Ib.*

4. An executor or administrator has no right to refuse or neglect to avail himself of any defence furnished by the statute provisions limiting actions against him, and which are intended to insure the speedy settlement of estates; and no license can be granted to sell real estate for the payment of demands which are barred by those statutes. *Ib.*

FIXTURES.

Windows placed in a dwelling-house

are fixtures, and pass with the estate. *The State* v. *Elliot*, 540.

2. Where tenant at will procured windows for a dwelling-house, and permitted them to remain on his leaving the premises — *Held*, that he could not subsequently enter to remove them. *Ib.*

3. Where he entered for this purpose, and had obtained possession of the windows, and was leaving with them — *Held*, that the owner of the property, or his agent, might re-take the property, by seizing upon the windows, and forcing them from such person, using no more violence than was necessary for this purpose. *S. C.*, 541.

4. Where an individual was complained of for assault and battery, in retaking property taken under such circumstances — *Held*, that the complaint could not be sustained. *Ib.*

FRAUDULENT CONVEYANCE.

A conveyance of his farm, by a person indebted, in consideration of a promissory note for half of the value, and a bond with a condition for the maintenance of the grantor during life, for the residue, is fraudulent and void against creditors whose demands existed at the time of the conveyance, unless property is retained, sufficient for the payment of his debts, upon which creditors may levy. Whether that would alter the case, *quere?* *Smith* v. *Smith*, 460.

JUDGMENT.

A judgment of a court which has no jurisdiction of the cause is entirely void. *Smith* v. *Knowlton*, 191.

2. Where the court has jurisdiction of the cause and the parties, and proceeds erroneously, the judgment, notwithstanding the error, is binding until it is vacated or reversed. *S. C.*, 192.

3. The judgment of a court of record of any other of the United States, rendered without personal notice or appearance to the action, against a defendant at the time a citizen and resident within this state, when an action is brought thereon within this state, is treated as a mere nullity, and the action must fail. *Rangely* v. *Webster*, 299.

4. And such judgment is equally a nullity, when produced in evidence in answer to an action commenced here upon the original demand. *Ib.*

5. But a judgment thus recovered in another state, and *partially satisfied*, constitutes a bar to a recovery upon the original demand here, to the extent of the sum paid there in virtue of the judgment, and to that extent only. *Ib.*

6. Where there are several defendants, and the judgment is entire against all of them, and is void as to one, it is void as to the others also. *Ib.*

LIEN.

An attorney has, as against his client, a lien for his general balance, upon a note deposited with him by his client for collection. *Dennett* v. *Cutts*, 163.

2. And where the client gave the attorney a note for the amount of such balance, it was *held* that the lien was not discharged, as it did not appear that the note was given or received in payment of the balance. *Ib.*

MORTGAGE OF PERSONAL PROPERTY.

Certain personal property was mortgaged to the plaintiffs to secure the payment of "fifty dollars, in sixty days from the date hereof, meaning and intending the legal claims and demands they have against me" — *Held*, that this condition was not void for uncertainty, the true construction of it being, that it was to secure the payment of the sum due, not exceeding fifty dollars. *North* v. *Crowell*, 251.

2. Where personal property mortgaged remained in the possession of the mortgager for three years after the date of the mortgage, the mortgager being insolvent, and having no other attachable property — *Held*, that this was not conclusive evidence of fraud, but was only a circumstance tending to show fraud. *Ib.*

3. Where the object of a mortgage is to secure an existing demand, the fact that it was also intended to cover future advances does not avoid the mortgage. *Ib.*

4. Prior to the statute of June 22, 1832, entitled "an act to prevent fraud in the transfer of personal property," neither the record of a mortgage of personal property, nor possession thereof by the mortgagee, was essential to the validity of the mortgage. Nor was the possession of personal property, after a mortgage of it by the former owner, conclusive evidence of fraud in the transfer. *Hoit* v. *Remick*, 285.

5. By that act, it is made requisite, in order to give validity to such mortgage, as against all others except the parties thereto, either that the mortgagee *should take and retain possession* of the property mortgaged, or that the mortgage should be recorded in the office of the clerk of the town where the mortgager resides *at the time of making the mortgage.*

6. The removal of the mortgager, after executing the mortgage, from the town in which he resided at the time of its execution, taking with him the mortgaged property, and retaining the possession of it, imposes upon the mortgagee no necessity of recording the mortgage in the town to which the mortgager may so remove. *Ib.*

7. The provisions of the statute are complied with, in the particular of *the place of the record*, both according to the letter and spirit of it, by a record of the mortgage only in the office of the clerk of the town where the mortgager resided *at the time of executing the mortgage.* *Ib.*

PARTNERSHIP.

One partner cannot sell, or mortgage, his undivided interest in a specific part of the property belonging to the partnership. *Lovejoy* v. *Bowers*, 404.

2. If he may mortgage his interest in all the partnership property, such mortgage cannot avail against the creditors of the partnership who attached the partnership property. *Ib.*

3. And there is no distinction, in this respect, between creditors who were such prior to the mortgage, and those who became so subsequently. *Ib.*

SALES.

It is not sufficient, to avoid a contract of sale, that the price agreed to be paid appears to be excessive. Gross inadequacy of value may be a strong circumstance to show fraud; but if there is no fraud or imposition, the parties have the right to fix the measure of value, and are bound by it. *Bedel* v. *Loomis*, 9.

SHERIFF.

The command, in writs of execution, requiring the officer "to attach the goods or estate of the debtor, if any may be found within his precinct, and for want thereof to take the body; also to make due return of the execution," is imperative, and binds the officer to the exercise of due care, diligence and fidelity in fulfilling these requirements of the precept. *Richards* v. *Gilmore*, 493.

2. In cases, however, where the proper service of such precept is a matter of doubt and difficulty, or where there are conflicting titles to property, supposed to be the debtor's, the officer can place the risk and responsibility upon the creditor, by requiring specific directions from him as to the mode and manner of the service, and sufficient indemnity to hold the officer harmless. *Ib.*

3. Where real estate had been attached and returned on mesne process, without mention of incumbrance on the same, and, on judgment recovered, execution was delivered to an officer, for service and levy on the property, and the officer levied on a mere equity of redemption, where the debtor owned part of the estate in fee — *Held*, that the officer was liable in damage for any loss sustained thereby by the creditor, unless he could show affirmatively that there was no want of due care and diligence on his part. *Ib.*

4. In estimating the damage in such case, the actual value of the execution, or any amount received on the execution, by the creditor, is to be allowed the officer in reduction of any claim for damage. *Ib.*

5. Where the creditor had, on some compromise with the debtor, discharged the execution, except so far as he might have a claim on the officer — *Held*, that this did not prevent recovery against the officer for the damage incurred, deducting from the claim against him the actual value of the execution, or any amount received thereon. *Ib.*

6. An officer who attaches goods by virtue of a writ, and deposits them with a bailee for safe keeping, who converts them to his own use, without the knowledge or assent of the officer, is not liable as a joint trespasser with such bailee in an action of trespass brought by the owner of the goods. *Barron* v. *Cobleigh*, 558.

Notice of New Books.

MESSAGE OF THE GOVERNOR, RETURNING THE RESOLUTION, ON THE PETITION OF JOHN J. HOWE AND OTHERS *vs.* THE WASHINGTON BRIDGE COMPANY, WITH HIS OBJECTIONS. Hartford: John S. Boswell. 1845.

SOME one has sent to us by post this little pamphlet, containing the veto of Governor Baldwin, of Connecticut, upon one of the most singular legislative acts that we have lately heard of. We speak of course without book, any farther than we gather the facts from the message itself. It seems that the legislature of 1802, chartered the Washington Bridge Company with authority to erect a bridge across the Housatonic river, with a right to collect a toll on the completion of the work to the satisfaction of commissioners. The bridge was accordingly constructed, with a draw of the width of thirty-two feet, and with suitable piers and piles in connection therewith, for the accommodation of vessels navigating the river.

But in the course of time it was found that the draw was not of sufficient width to admit the passage of steam-vessels, which have since come into use, of a size best adapted to the increasing business of the inhabitants bordering on the river above. And now the general assembly with less real wisdom and more injustice, than has recently been exhibited in a deliberative body, pass a resolution requiring the company, at its own expense, to make and thereafter maintain, a good and sufficient draw in some convenient place in the channel of the Housatonic river, between the piers where the draw now is, not exceeding fifty feet in width, so as to admit the free and easy passage of all registered or licensed vessels which shall have occasion to pass and repass through the same, whether navigable by sails or by steam; and subjecting the company, on their neglect to commence and complete such draw, after reasonable notice from the commissioners, to damages, and a forfeiture of their right to collect tolls of travellers, until such draw is completed.

There is a point and vigor in such legislation which must commend it to those who desire to "get at a thing" in the least possible time. Other states have been satisfied with taking away the property of corporations by implication — as by chartering other companies, whose operations must necessarily have that effect. It remained for Connecticut to compel a corporation to furnish accommodations to the public at its own expense. Why should not the members vote themselves free beds at the public houses in the city where they legislate? There is *one* public house in Hartford, wherein, if such an act is a specimen of mental condition, we should think the makers of it entitled to be accommodated.

Governor Baldwin meets this act with firmness and dignity. His argument — or rather his *statement*, for an argument was scarcely necessary — is simple and cogent. We can only express our surprise that the resolution was passed in spite of it, although we believe that in Connecticut a bare majority is sufficient to pass an act notwithstanding the governor's objection.

Intelligence and Miscellany.

Case of Flowery.—The recent trial of Peter Flowery, before the Circuit Court of the United States, sitting in Boston, before Sprague J, excited considerable attention, from the novelty of the case and of the facts proved. There was little or no difference between the counsel upon questions of law. The defendant was charged with having caused to sail from New Orleans in November, 1844, the schooner Spitfire, with intent to employ her in the slave trade. A second count in the indictment charged the defendant with having aided another person in fitting out the Spitfire for that trade.

It appeared in evidence that the Spitfire was once known as the Carabello, of Baltimore, where she was built, and that she was under the command of Captain Gordon, of Portland, Maine, who made sale of her to one Paul Faber, in Rio Pongo, on the coast of Africa in 1843. Her name was then scratched off her stern, and she took in a cargo of about 350 slaves, with which Gordon proceeded to Havana. Gordon and his mate, Turner, subsequently sailed from Boston in the schooner Manchester, to Rio Pongo. Soon after she arrived there, Captain Gordon died, and the Manchester was afterwards wrecked. Turner, the mate, found his way to the U. S. schooner Truxton, then on the coast, and gave information that the schooner Spitfire, then in the Rio Pongo River, was the same vessel formerly known as the Carabello, and a slaver. He gave this information, as he testified, from revenge, in consequence of some trouble with Faber (who he supposed owned her) in not paying him his wages.

An expedition of boats, English and American, was immediately fitted out, and the Spitfire was seized. She was found near Faber's slave factory, with a portion of her cargo, consisting of ten hogsheads of tobacco and some other articles still on board. She was in command of Captain Flowery, the defendant, and had been lying there several weeks. By the papers found on board, it appeared that Captain Flowery had sailed in her from Havana to Key West, and thence to New Orleans, where a bill of sale appeared to have been executed to Flowery by one J. M. Anguerra, acting as the agent of Edwin A. Falker, of Key West. The price paid for her was $7500. She had no Register, but upon the bill of sale there was a certificate that she was American property, with a statement that she could have no register in consequence of having been owned by foreigners. There was also found a charter-party executed between the Captain and one J. Scorsur, by the terms of which the vessel was to proceed from New Orleans to Havana, and thence to Rio Pongo, for $5000. It appears in evidence that the vessel sailed from New Orleans in November, with a cargo consisting of 30 hogsheads of tobacco and some smaller articles. She proceeded to Havana with Scorsur on board. There she took in some shooks and dry goods, and cleared for the Cape de Verd Islands, but she proceeded to Rio Pongo direct. There were on board a Frenchman and a Spaniard, each of whom relieved the captain of his watch in his turn. There was also evidence tending to show, that these passengers kept the run of the voyage on charts of

their own; and there were found on board several English, French and Spanish charts. When they arrived on the coast, the Frenchman and a part of the crew went in the boat in search of a pilot, and while the boat of a British steamer was approaching, the Frenchman took from his coat a flag (it did not appear of what nation,) and threw it into the water, remarking that if the British should find it on board they would seize the vessel.

The number of men on board the schooner was eight besides the captain and passengers. The schooner was of 96 tons burthen; of a costly finish, with 12 sweeps, or large oars, and many sails.

One of the crew of the Manchester testified that he heard a conversation *in English*, at Rio Pongo, between the Spaniard, the Frenchman, and Faber, the owner of the factory, in relation to taking a cargo of slaves on board; but in the defence it was testified that the Spaniard could not talk a word of English. Antonio, a Spanish boy, who acted as steward, testified that he had often heard Captain Flowery, the Spaniard and the Frenchman, talking of taking a cargo of slaves. But his testimony was somewhat confused and contradictory, and the defendant's counsel contended that it was entitled to no credit. With the exception of Antonio, all the men testified that they did not ship for a slaving voyage; that they had no reason to suppose they were on such a voyage, until it was so rumored at Rio Pongo.

There were many other facts and circumstances in the case, from which the District Attorney contended that the vessel must have been on a slaving voyage. He particularly pressed the point that the vessel was once in the trade as the Carabello; that she was peculiarly well fitted for a slaver; that the circumstances of the sale to Flowery were suspicious; that the alleged charter-party was absurd, inasmuch as the price to be paid ($5000) was enormously high, and, generally, that the facts in the case were irreconcilable with the notion, that the voyage was in the regular course of trade. He also contended that the vessel was to have changed captains when the slaves were taken in, and that the Spaniard was to act in that capacity on the return voyage.

On the part of the defence it was contended, and evidence was offered to show, that there was nothing unusual in the voyage, or in the character of the vessel; that she is a Baltimore clipper and is precisely similar to all vessels of her class; that whatever might have been her former name, and whatever her character, there was no evidence to show that the defendant ever knew her except as the Spitfire and an honest craft; that there was no reason to doubt the validity or honesty of the sale to the defendant in New Orleans; and that she was regularly advertised there for several weeks before the sale; that the Frenchman and Spaniard were *bona fide* passengers, and that it was not unusual for passengers who were seafaring men to keep the run of the voyage and relieve the captain of his watch; that the cargo on board was a proper one for the lawful trade on the African coast, and that the size of the Spitfire fitted her for the trade.

There were many other points, on both sides, which were relied upon, but to which we have no room to refer with more particularity. The jury, after a consultation of about an hour, returned a verdict of guilty, but recommended the prisoner to mercy. A motion has been made for a new trial, and stands for argument.

The case was managed by Robert Rantoul, jr. district attorney, for the United States, and by J. P. Rogers and P. W. Chandler for the defendant.

A Voice from Vermont. — A writer in the Vermont Mercury, newspaper, of June 13, has been airing his vocabulary at our expense. We offer him the use of our circulation, and insert his remarks below. With the proprietor of Do-the-boys'-Hall, when tasting the milk and water, we exclaim, "Here 's richness!"

"*The Law Reporter — Edited by P. W. Chandler, Boston. No.'s for May and June*, 1845. — So long as that journal passed by our state judiciary in silence, we were disposed to be a silent reader of its pages, though by no means satisfied that the imputation of insignificance, which its silence cast upon our court and bar, was either just or politic. We should not now proffer a remark, but for the character of its *first* notice of our judicial proceedings, con-

tained in the last two numbers. That notice consists of short and imperfect notes of the cases decided at the last term of the supreme court in Washington county, copied from the Vermont Patriot; in which paper they were published for the information of persons in the county, interested to know the result of their own or their neighbors' lawsuits, and by no means intended to grace the pages of a juridical journal, as specimens of the practical judicature of the state. If the editor of the Reporter had been disposed, at so late a day, to be just to the bench and bar of the state, it would have been much more satisfactorily indicated by applying to some one to furnish proper notes of some of the important cases decided, instead of taking the hasty minutes of the cases, *en masse*, decided at one term in a single county. It would have had a better seeming, had he cast his eye over the digested contents of some of our 15 volumes of 'Vermont Reports,' and given some fairly selected extracts a little of such space as is granted to the reports of our sister New England States.

"The ill grace of the matter is by no means relieved by the note in the last No., under the head of '*Hotch-pot*.' We take no exception to the editor's report of the case against the Town of Roxbury. It is a proper report of such a case.

"But we deem his compliment to our bar, in connexion with his apology for not having noticed our judiciary before, to be exceedingly ill-favored. If our bar are worthy of the compliment, then the apology is most lame. Though no one may have 'sent him notes of the decisions,' a full volume of reports has been published yearly by authority, some of which have probably strayed as far from home as Boston — reports, too, which, though of no very great pretension, contain cases that have received attention and commendation from some very well esteemed juridical writers, and some *tolerable* lawyers and judges in neighboring states. 'Washburn's Digest,' of the reports of this state, lately published, is an elaborate and faithful digest of all the reported cases, and, as we deem, is in no way discreditable to our judiciary. Some passing notice of this, with an extract or two, if merit and space had allowed, would have been quite as satisfactory as the indiscriminate batch of *minutes* taken from the weekly newspapers.

"We are too small a state, and too far from the centre of juridical light, rightfully to expect *generosity* from our more favored superiors. But we despise the meanness which is manifested in the shallow and false apology for the neglect to be *just*, which is contained in the last number of the Reporter."

New Books received. — Reports of Cases in Chancery, argued and determined in the Rolls during the time of Lord Langdale, Master of the Rolls. With Notes and References to both English and American Decisions. By John A. Dunlap, Counsellor at Law. Vol. XV. Containing B. Keen's Chancery Reports, Vols. 1 & 2, 1836, 1837, 1838, 1839. New York: Gould, Banks & Co. 1844.

Reports of Cases decided in the High Court of Chancery, by the Right Hon. Sir Lancelot Shadwell, Vice-Chancellor of England. With Notes and References to both English and American Decisions. By John A. Dunlap, Counsellor at Law. Vol. XVI. Containing Simon's Chancery Reports, Vols. 9 & 10, 1837, 1838, 1839, 1840, with a few cases in 1841 & 1842. New York: Gould, Banks & Co. 1845.

The Duties and Liabilities of Sheriffs, in their various relations to the Public and to Individuals, as governed by the principles of Common Law, and regulated by the statutes of New York. Revised, corrected and enlarged, by Otis Allen, Counsellor at Law. Albany: Wm. & A. Gould & Co., and Gould, Banks & Co., New York. 1845.

A Digest of all the Cases decided in the Supreme Court of the state of Vermont, as reported in N. Chipman's, Tyler's, Brayton's, D. Chipman's, and Aikin's Reports, and the first fifteen volumes of the Vermont Reports. Together with many manuscript cases not hitherto reported. By Peter T. Washburn, Counsellor at Law. Woodstock: Haskell & Palmer. 1845.

Reports of Cases argued and determined in the Circuit Court of the United States, for the first circuit. By William W. Story, Reporter of the Court. Volume 11. Boston: Little & Brown. 1845.

Notch-Pot.

It seemeth that this word Notch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

We call the attention of our Massachusetts readers to the decision of the Supreme Court in the *matter of Jordan* reported in our present number, involving some important points in the practical operation of the Insolvent Law. It is proper for us to state, that the report has been prepared by one of the counsel in the case, and has not had the advantage of a revision by the Court; but we have every reason to suppose that it is substantially correct.

The view taken by the Court, that the oath of the creditor to the facts alleged in his petition, is not to be received as evidence at the hearing, seems opposed to the doctrine of Mr. Justice Story in *Foster* v. *Remick*, (5 Law Reporter 406). That was a proceeding *in invitum* by creditors to have a debtor declared a bankrupt under the act of Congress. The Court decided that in a proceeding *in invitum*, the oath of a petitioning creditor was ordinarily a sufficient *proof of his debt* to sustain his right, but was liable to be rebutted by counter proofs, and might be overcome by such proofs. Thus, where the supposed bankrupt denied the existence of the debt, and offered *primâ facie* evidence that it was not due, the oath of the petitioning creditor to the debt, without further proof, was not a sufficient foundation for a decree of bankruptcy.

It should be remarked, however, that the precise points raised in the two cases, although similar, are by no means identical; and the provisions of the Bankrupt Act and the Insolvent Law in regard to proceedings *in invitum* are different. At the same time, we believe a habit has grown up among Masters in Chancery of considering the oath of the petitioning creditor as *primâ facie* evidence of the facts therein set forth.

The students in the Cambridge Law School, with the Alumni, are to have a celebration on the third of this month. An oration is to be delivered by Mr. Choate, after which the company will dine together in Dane Law College, which has been recently very much enlarged in order to accommodate the increasing number of students and the library. The school was never in a more flourishing condition in all respects; and arrangements have been made, which will soon be made public, to render the advantages of the institution still more obvious.

A grave looking citizen in a Quaker's dress, being called as a witness in Bristol county, was asked by the Clerk whether he would be sworn or affirmed. "I don't care a d — n which," was the reply, which is said to have disturbed, for a moment, the gravity of the Judge.

A justice of the peace in Norfolk county rendered a judgment in favor of the plaintiff for thirty dollars. "But you can't do it," exclaimed the defendant's counsel; "you are limited by the statute to twenty dollars." "Can't do it!" said his honor, "don't you see I have just done it?"

Obituary Notices.

At his residence in Nashville, Tenn., on Sunday evening, the 8th of June, Andrew Jackson, aged seventy-eight. He was born on the 16th of March, 1767, at the Waxsaw settlement in South Carolina. His parents were emigrants from Ireland, who had settled in the place two years before, and followed the occupation of farming. Andrew, whose father died shortly after his birth, was sent to a flourishing school in the neighborhood, where he remained till the revolutionary war broke out. At that time, though but fourteen years old, he left school, and with his two brothers, older than himself, joined the American army, in which he continued till the close of the war. In the winter of 1784, at the age of eighteen, he retired to Salisbury, N. C., where he commenced the study of law. In two years he was admitted to practice, and emigrated to Tennessee, (East) and afterwards to Nashville, where in 1788 he located himself permanently. Here he soon obtained a lucrative practice. In 1796, he was elected one of the members of a convention assembled to frame a constitution for the state. In the following year he was sent to Congress, to the House of Representatives, and in the next he became a member of the United States Senate. He resigned in the same year. While at Washington as a senator, he was elected Major General of the Tennessee militia, which rank he continued to hold till 1814, when he received the same grade in the regular army. On his return from Congress, he was appointed one of the Judges of the Supreme

Court of Tennessee. He resigned this office after holding it a short time, and retired to his farm, about twelve miles from Nashville. Here he remained till the war with Great Britain in 1812. He took command of a body of volunteers, and in January, 1813, conducted them to Natchez, where he remained several weeks, and the threatened danger of invasion in that quarter having passed over, he returned to Tennessee and disbanded his troops. He did not remain long inactive. The Creek indians, south of the Tennesee river, having become hostile to the United States Government, were committing great depredations on the frontiers. In October 1814, Jackson marched against them at the head of 3,500 men, who had been ordered out by the legislature, and defeated them in several battles; after which he returned home, and the Tennessee army was discharged. General Jackson was now appointed a commissioner to enter into a treaty with the conquered tribes, during the ratification of which he received information that a British force had been landed at Pensacola, and were proceeding to arm and equip hordes of savages. He sent advices to the Government, and urged the necessity of dismantling this fortress. General Coffee having arrived on the spot with 2000 well armed men, Jackson placed himself at their head, entered Pensacola, drove out the British, and reduced the Spanish Governor to terms. He did not remain in this place long, but, convinced that New Orleans was the chief object of attack, he marched thither on the 1st of December, and making that city his head quarters he prepared for its defence. The British made several assaults upon the city, but their final attack was reserved for the eighth of January. On that day they were defeated with great loss, and on the 18th the remnant of the army embarked in their ships. Jackson remained in the city till the news of the treaty of peace arrived, when he returned home. In 1818, by command of Government he marched an army into Florida, against the Seminoles, who had been perpetrating outrages on the settlers. He was soon appointed Governor of Florida, and established the government on a firm basis. At the close of the year he returned to Nashville. Here he remained till 1824. He was then proposed as a candidate for the Presidency, and was chosen to that office in 1828. He held the station until 1837, having been re-elected in 1832. On leaving the office of the Presidency he returned to his home, where he continued to reside till his death.

In Bangor, Me., Hon. DAVID PERHAM, aged sixty-five. He was born in Ashby, Mass., and when quite a child his father connected himself with a society of Shakers, and in this community Judge Perham lived until he was twenty-one years of age. He had for several years previously desired to leave the society, but his habits of obedience were too strong to do so against the wishes of his parents, and he remained until the day he was twenty-one years of age, when he left. He read law with Judge Dana, of Groton, and settled at Brewer, in Maine, in 1810. He was for some time Judge of Probate — was a member of the convention to frame the constitution of the state — in 1821 was appointed a Justice of the Court of Common Pleas, which office he held until 1839, when the Court was abolished. The bar of Penobscot county held a meeting on the occasion of Judge Perham's death, and suitable resolutions were adopted. Hon. Gorham Parks, at the request of the bar, announced his death to the District Court in an appropriate manner, to which Judge Allen responded, and adadjourned the Court.

In Brooklyn, N. Y., Brigadier General GILBERT REED, Jr., a member of the bar. He had been attending to his business through the day, and as late as nine o'clock, P. M., was seen by acquaintances, apparently in full health. About one o'clock on Tuesday morning, he went to the house of his father-in-law, Andrew Demarest, Esq., in Poplar street, and woke up Mr. Charles Demarest, saying he was very sick, and must have something done for him. Mr. D.'s wife procured a mustard plaster and placed it on his stomach, he appearing to be suffering under a severe attack of bilious cholic. This remedy gave him no relief. He asked for laudanum, which he said was the only medicine that gave him relief in such attacks, which were not unfrequent, and a teaspoonful was given him. Still he got no better, and he craved for and would have more, saying he knew well how much to take without danger. More was given him, until in all, he had taken five or six teaspoonsful, when the pain somewhat abated, and he wished to go home. He was, however, persuaded to lie down, and about three o'clock his peculiar hard breathing alarmed Mr. D., who immediately went for and brought Dr. Van Pelt, who administered such treatment as is usually resorted to in such cases, which proved ineffectual, and the poor sufferer died about nine o'clock. An inquest was held on the body, and a verdict returned that "deceased came to his death from the effects of laudanum, administered at his own urgent request, while suffering under a severe attack of bilious colic."

In Indiana, of consumption, Hon. JAMES MCKENNAN, one of the Associate Judges of Indiana, aged forty-two.